Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JERRY W. DAVIS,
Petitioner,

v.

SIEMENS MEDICAL SOLUTIONS USA, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 25, 2008

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QUESTION PRESENTED

Whether the lower courts' failures to properly apply Kentucky's common law of fraud in granting the Defendant's renewed motion for judgment as a matter of law, and the lower courts' failure to properly apply Kentucky's wage and hour laws violated fundamental Constitutional principles of Federalism?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Jerry Wade Davis, an individual, and Siemens Medical Solutions USA, Inc., a non-governmental corporation.

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JURISDICTION

This Court has jurisdiction to review the May 28, 2008 *per curiam* opinion of the U.S. Court of Appeals for the Sixth Circuit panel and the August 27, 2008 en banc order of the U.S. Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

KRS § 337.385. Employer's liability -- Unpaid wages and liquidated damages.

> (1) Any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less

any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court. Provided, that if, in any action commenced to recover such unpaid wages or liquidated damages, the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of KRS 337.020 to 337.285, the court may, in its sound discretion, award no liquidated damages, or award any amount thereof not to exceed the amount specified in this section. Any agreement between such employee and the employer to work for less than the applicable wage rate shall be no defense to such action. Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself or themselves.

(2) At the written request of any employee paid less than the amount to which he is entitled under the provisions of KRS 337.020 to 337.285, the executive director may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. The executive director in case of suit shall have power to join various claimants against the same employer in one (1) action.

STATEMENT OF THE CASE

Plaintiff/Appellant, Jerry W. Davis ("Mr. Davis" or "Plaintiff"), was employed at Siemens Medical Solutions USA, Inc. ("Siemens" or "Defendant") for over a decade, from 1992 to 2003. In 2002 Mr. Davis was expressly, and in detail, promised commissions on national sales for Siemens, as the first holder of the newly created position of National Product Sales Executive.

In this new position Mr. Davis contributed substantially to an over ten million dollar increase in sales for the IM Division during the 2003 fiscal year, earning for himself promised guaranteed amounts, and nearly $1.77 million in commissions, which Siemens fraudulently, and in breach of its promises, chose not to pay.

On March 31, 2004, Mr. Davis filed his complaint against Siemens in the U.S. District Court for the Western District of Kentucky. Cross motions for summary judgment were filed on July 6, 2005. The trial court, at that time presided over by Chief Judge John G. Heyburn, II, was presented with evidence of the oral and written agreements and communications between Mr. Davis and Siemens, including a Compensation and Commission Plan ("Commission Plan"). The district court erroneously concluded that this generic commission plan was unambiguous, and interpreted specific language within the Commission Plan in a way that was expressly contradicted by other provisions of the same Commission Plan. (App. 29a) The district court erroneously denied Mr. Davis's dispositive motion on November 8, 2005, while incorrectly granting the Defendant's motion for

summary judgment on all of the Plaintiff's claims, except fraud, as to which it correctly denied Summary Judgment. (Id.)

On February 22, 2006, Magistrate Judge Moyer, who had taken over the case for trial because of Judge Heyburn's schedule, and pursuant to agreement of the parties, issued a written order, erroneously granting several of the Defendant's exclusion requests, but also refusing to exclude evidence relating to the mistreatment of Mr. Davis by Siemens' divisional Vice President, Thomas K. Riesenberg ("Mr. Riesenberg"), and evidence of Siemens' failures to pay other employees their earned commissions.[1] (App. 24a) After the opening statements were completed and testimony had begun, the trial court erroneously reversed itself in part, and, over Plaintiff's counsel's objections, also disallowed any evidence of Mr. Riesenberg's malicious treatment of the Plaintiff, and many of Mr. Davis's exhibits relevant to Siemens' continuing course of fraudulent and malicious, punitive-damages-worthy conduct. (App. 101a-102a)

The jury, after listening carefully for several days to live and transcript testimony, being extensively instructed by the court, and deliberating for hours, found unanimously in favor of Mr. Davis on his fraud

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[1] The trial court also erroneously granted several of the Defendant's motions, incorrectly holding in the same February 22, 2006 order that the following relevant evidence would be excluded: (1) evidence that Mr. Riesenberg similarly mistreated other Siemens' employees, (2) evidence that the Defendant failed to provide the Plaintiff with a promised company car, and, (3) evidence that the Defendant failed to pay Mr. Davis the entirety of his Guarantee Rider.

claim, and awarded him compensatory damages of $200,000.

Despite an unequivocal ruling by the district court against Siemens' Rule 50(B) motion during trial, Siemens filed a renewed motion for judgment as a matter of law following the unanimous jury verdict. App. 70a Notwithstanding the immediate availability during trial of daily transcripts (the cost of which were shared by the Plaintiff and Defendant), over a year later, with the impact of the witnesses' demeanor and testimony seriously faded, the trial court reversed itself once again, and granted Siemens' renewed motion, on March 6, 2007. (App. 8a) A panel of the Sixth Circuit rendered a *per curiam* opinion on May 28, 2008, affirming the decisions of the trial court. This opinion, in the main, simply adopted by reference the trial court's erroneous reasoning for its decisions.

On August 27, 2008 a Sixth Circuit panel issued an order denying Mr. Davis Petition for Rehearing En Banc. This Petition for Writ of Certiorari is now timely filed.

REASONS FOR GRANTING THE PETITION

A. IMPORTANT PRINCIPLES OF FEDERALISM DICTATE THAT THE FEDERAL COURTS MUST RESPECT AND ABIDE BY ESTABLISHED PRINCIPLES OF STATE LAW

When a federal court is sitting in diversity, principles of federalism dictate that the court respect the laws of the state courts and legislatures. "This separation of the two spheres is one of the Constitution's structural protections of liberty. 'Just

as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'" Printz v. United States, 521 U.S. 898, 921 (1997) (quoting, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)). See also United States v. Morrison, 529 U.S. 598, 655 (2000) (J. Breyer, dissenting in part) ("[n]o one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty -- both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home.").

In fact this principle has been recognized specifically by Federal case law repeatedly for seventy years now in the Erie Doctrine. That doctrine requires that the Federal courts respect the laws of the States in diversity cases. This Court in Erie recognized that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." Erie R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938).

Federal courts since Erie was decided continue to respect and adhere to the fundamental principles espoused in that case, namely that "[i]n diversity cases, the federal court must apply state law in accordance with the controlling decisions of the state's highest court." Salens v. Tubbs, 2008 U.S. App. LEXIS

19012, 7-8 (6th Cir. Mich. 2008) (citing, Eric R.R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938)).

However, in the present case, both lower courts have ignored the dictates of the Erie Doctrine, and the constitutional principles of Federalism anchoring it, by flouting the laws of Kentucky, as established by its legislature and its highest court. The lower courts violated these important principles when they denied Mr. Davis the chance to have his wage and hour claim heard by a jury, as required by KRS § 337.385. They also violated these fundamental principles when granting Siemens' renewed judgment as a matter of law, by failing to abide by the law established by the Kentucky Supreme Court, inter alia, in Hanson v. American Nat'l Bank & Trust Co., 865 S.W.2d 302 (Ky. 1993), which unequivocally held that no contract language is strong enough to protect a party from its own fraud. For these reasons Mr. Davis respectfully requests that the Court grant this Petition for Writ of Certiorari and reaffirm the principles of Federalism that bind the federal courts.

1. The Court of Appeals' Panel Decision Regarding the Wage and Hour Claim and Contract Claim Was Contrary to Precedent and Violated Principles of Federalism.

The lower courts improperly applied Kentucky's wage and hour laws, KRS § 337.385, and denied Mr. Davis the opportunity to have his wage and hour claim heard by a jury. The lower courts' decisions with respect to Mr. Davis's wage and hour claim were contrary to established State precedent and violated the dictates of Federalism commanding that the laws

of the States be respected and followed in diversity cases.

In the fall of 2002, Mr. Davis was promised a first year base salary for the newly created National PSE position equal to $100,000 ($65,000 together with an additional (for one year) guaranteed income amount of $35,000), which total amount was promised by Siemens in a letter and Guarantee Rider sent by Siemens to Mr. Davis. (App. 135a, 138a) ("You will be paid a bi-weekly salary of $2,500," and "[t]he total of all Guarantee payments will total $35,000.00.") (App. 135a) That Siemens promised this base pay to Mr. Davis, including the Guarantee Rider amount, is undisputed by Siemens. (App. 138a)

Despite the undisputed promise by Siemens to pay this full $100,000 amount to Mr. Davis, Siemens underpaid Mr. Davis, as to this base income and rider, by at least $14,023.49. Mr. Davis was entitled to recover this unpaid guaranteed wage, plus an amount equal to the same in liquidated damages, interest, and incurred attorneys' fees, all under KRS 337.385.

In granting the Siemens' Motion for Summary Judgment on the issue of Mr. Davis's wage claim under KRS 337.385, the district court initially erroneously held that Mr. Davis's claim failed because he had not satisfied an administrative prerequisite. (App. 60a)

One day after briefing was concluded on the cross-motions for summary judgment, the controlling decision to the contrary was rendered by the Kentucky Supreme Court in Parts Depot, Inc. v. Beiswenger and Housing Authority of Middlesborough, 170 S.W.3d 354

(Ky. 2005). The Kentucky Supreme Court held that an individual is not required to bring his or her wage claim before the Labor Commissioner. To the contrary, that Court held that a case can be brought directly to civil court under this State statute, and that a trial court has original, subject matter jurisdiction over these types of claims. Id.

Mr. Davis moved to alter the district court's erroneous order pursuant to this Parts Depot case, and brought this controlling decision squarely to the district court's attention. (App. 64a) In the district court's holding on Mr. Davis's motion to modify, however, the district court erroneously advanced a new reason for dismissing the Plaintiff's entire wage claim and not allowing it to go forward. (App. 26a) The district court mistakenly concluded that the unrelated terms of the Commission Plan did not entitle Mr. Davis to the claimed commissions, bonuses, and guaranteed income. (Id.) The Commission Plan did not control or set forth the terms for the income guaranteed to Mr. Davis by Siemens in the employment letter and Guarantee Rider referenced above.

Furthermore, the district court's conclusion that the terms of the Commission Plan did not entitle Mr. Davis to commissions and bonuses was, in and of itself, erroneous, as explained more fully below. (In addition to his unpaid base pay, however, Mr. Davis also was entitled under the wage statute to the commission and bonus wages for which he was eligible under the Commission Plan.)

No part of Mr. Davis's Wage and Hour claim should have been subject to summary judgment. The motion

to alter the district court's incorrect opinion and decision denying all of these claims was improperly denied, contrary to the established statutory and case law of Kentucky.

When Mr. Davis appealed this incorrect holding to the Sixth Circuit Court of Appeals, the Defendant conceded in its briefing before the Sixth Circuit, and during the appellate oral argument, that Mr. Davis was owed the full $35,000 guarantee rider, a substantial part of which he still was not paid. Subsequently, the Sixth Circuit panel erroneously misstated in its opinion that, "[t]o the extent that Davis's statutory claim is based upon the failure of the defendant to pay the entire base salary promised in the company's guarantee rider, we are informed by counsel that the issue has been resolved out of court to the satisfaction of both parties." Davis v. Siemens Med. Solutions USA, Inc., 2008 U.S. App. LEXIS 11934, *5-6 (6th Cir. 2008). **To the contrary, counsel for Mr. Davis never informed the panel of any resolution or satisfaction of any claim.** (App. 142a-147a)

Siemen's exceedingly belated partial payment of the unpaid Guarantee Rider, after oral argument before the Sixth Circuit panel, did not properly compensate Mr. Davis for the time and expense he has invested to recover those funds; it did not include the permitted liquidated damages, the attorneys' fees, nor the statutory interest owed to him under KRS § 337.385.[2] "[S]ection 337.385 (1) 'unambiguously

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[2] Siemens' counsel himself has acknowledged in writing that this payment did not satisfy or resolve any claims: "These payments

authorizes an uncompensated or undercompensated employee to sue the employer in 'any court of competent jurisdiction' for the amount due and unpaid, plus liquidated damages, costs, and attorney fees.'" Oaks v. 3M Co., 453 F.3d 781, 783 (6th Cir. 2006) (citing Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354 (Ky. 2005)).

The Sixth Circuit and the trial court also erroneously reasoned that Mr. Davis supposedly was not "personally and directly responsible," in some sense other than what was reasonably understood by Mr. Davis and other Siemens' employees in the actual business context of their work, for the sales from which commissions and bonuses would be paid under the terms of the Commission Plan. This extraneous definition for "personally and directly responsible" employed by the lower courts was cobbled together imprecisely by the district court from multiple, conflicting definitions in a dictionary,[3] rather than

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are being made unilaterally and unconditionally. Siemens is not requesting that Mr. Davis waive any claims that he may have against the Company in exchange for this payment." See Letter from Dana Rust, Siemens' counsel. (App. 142a-147a)

[3] At least one of the definitions partially quoted by the district court for the term "responsible" is entirely consistent with the definition of that term understood by Mr. Davis, i.e., that he was "responsible" as being "answerable or accountable" for sales in National and Government Accounts. (App. 38a-39a) The court erroneously mingled two *separate* dictionary definitions of the word "responsible," reciting both "answerable or accountable" and "chargeable with being the author, cause, or occasion of something" in its opinion. (Id.) The lower court's dictionary source, The Random House Unabridged Dictionary, 2nd Edition, pg. 1641 (1993), lists those two definitions of "responsible"

sensibly derived from the language and intention of the plan and the parties, as ascertained from the actual provisions of the compensation plan and the practices of the parties.

Being "personally and directly responsible" for a sale either means what Mr. Davis and many of his colleagues on the sales staff of Siemens actually, reasonably understood it to mean, and Siemens led and wanted Mr. Davis to believe it meant, or it was ambiguous, uncertain, and indefinite. The district court's patchwork, mis-applied dictionary definition contradicts the Defendant's own established policy of paying commissions to PSEs on all sales **within their territories**.

It has long been the rule in Kentucky courts that parol evidence should be admitted where a written contract by its terms is ambiguous, vague, indefinite or

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separately under two different, separately numbered definitions, 1 and 3, respectively. The district court also omitted entirely the following bolded dictionary language from its quotation: "1. answerable or accountable, **as for something within one's power, control, or management**." (Emphasis added.) The District Court went on to quote, in part only also, the definitions from Random House for the terms "directly" and "personally." "Directly" is defined as "1. in a direct line, way, or manner; straight." The term "personally" is defined as itself meaning "directly," or "3. as regards oneself" or "4. as an individual." The definitional exercise shakily embarked upon by the trial court, when carried out carefully and completely to a proper conclusion, actually accurately fits Mr. Davis's understanding of the phrase: that he needed only be in a "direct line, way, or manner," "individually" "answerable or accountable" for National and Government Accounts Sales (all of which he was) to be entitled to and receive commissions for those sales.

uncertain in its meaning. Westinghouse Electric & Mfg. Co. v. Greenville Coal Co., 183 S.W. 901, 902 (Ky. 1916). This established rule of Kentucky law also was ignored by the lower Federal courts.

2. The lower Federal courts also ignored the common law of Kentucky by granting and affirming Siemens' renewed motion for judgment as a matter of law, more than a year after an unanimous decision by the Jury in the Plaintiff's favor, thereby ignoring State law and violating principles of Federalism.

The lower courts ignored clear Kentucky case law when it granted the Defendant's renewed motion for judgment as a matter of law. In its opinion, the Sixth Circuit affirmed the district court's finding that even if Doug Spotts, the Siemens National Sales Manager, had made representations "concerning the payment of commissions . . . Davis could not have reasonably relied upon that promise, given the clear contract language to the contrary." Davis v. Siemens Med. Solutions USA, Inc., 2008 U.S. App. LEXIS 11934, *3-4 (6th Cir. 2008). This reasoning flies directly in the face of the common law of Kentucky, as established by the Kentucky Supreme Court in Hanson v. American Nat'l Bank & Trust Co., 865 S.W.2d 302 (Ky. 1993). The court in Hanson held:

> The idea that any person or industry or enterprise would be immune from liability for fraud and deceit is not acceptable. . . The law should not, and does not permit a covenant of immunity to be drawn that will protect a person against his own fraud. Such is not enforceable

> because of public policy. Language is not strong enough to write such a contract. Fraud destroys all consent. It is the purpose of the law to shield only those whose armor embraces good faith.

Hanson, 865 S.W.2d at 309-310.

The Kentucky Supreme court in Hanson established that no contract language may exist in Kentucky strong enough to "protect a person from his own fraud." However, the lower Federal courts' reliance on the ambiguous written language of a boiler plate Commission Plan to make Mr. Davis's reliance on the fraudulent promises of Doug Spotts, the Siemens National Sales Manager, unreasonable as a matter of law, contradicts this established Kentucky Supreme Court common law. The lower Federal courts' reliance on the language in the Commission Plan to undercut Mr. Davis's reasonable reliance violates the Kentucky State law established in Hanson. As indicated, ignoring the law established by Kentucky's highest court runs afoul of the Erie Doctrine and the Constitutional principles of Federalism.

a. A reasonable jury could, and unanimously did, find that Mr. Davis reasonably relied upon Siemens' misrepresentations. Mr. Davis presented sufficient proof at trial on this material factual issue, which resolved it to the jury's satisfaction.

In overruling Siemens' motion for directed verdict, the trial court at that time stated clearly and compellingly its reasons for allowing Mr. Davis's

misrepresentation claim to proceed to the jury, as follows:

> THE COURT: All right. Thank you, Ms. Settle. Mr. Bishop, I'm going to rule on this now. I don't mean to cut you off, but I think that -- that -- ***I thought a great deal about this over the weekend. And I'm convinced this is a case that has to be decided by the Jury.*** I'm going to overrule the Rule 50 motion. I know it was thoughtfully prepared and well argued. But I think that, essentially, what Ms. Settle has argued is that it was, at worst, a misunderstanding, **taking a lot of inferences in ways that are most favorable to the defendant** and not favorable to the plaintiff. And I think it is ultimately up to the Jury to decide whether it was a misunderstanding or misrepresentation and if so, with what state of mind it was made. You know, there are some tough judgment calls here, but the Court is reluctant to substitute its view of the facts for the view of the facts that the Jury -- they are the judge of the facts. And **I acknowledge that there are some questions about what was said, what was the frame of mind, was there reliance, what is the impact of Mr. Davis' knowledge of the compensation plan, and there those are points for argument *with the Jury. The Jury may find them to be persuasive, but I don't think the Court wants to step in and take the case away from the Jury.*** I think that I've tried to listen as carefully as I can to the testimony, especially the testimony by Mr. Davis and Mr. Spotts, and I think there remains a factual

issue as to what was said, and what its impact was.

(App. 123a) (Emphasis added.)

There was a substantial amount of evidence in the trial testimony supporting the Jury's conclusion that Mr. Davis reasonably relied upon Mr. Spotts' representations that he would receive dual, override commissions on all sales made under national accounts. (App. 97a-99a) The district court undoubtedly and impermissibly ultimately reweighed the evidence already considered by the Jury when the court issued its order granting the Defendant's motion for judgment as a matter of law. "Courts are not free to reweigh the evidence. . . ." Barnes v. Owens-Corning Fiberglas Corp., 201 F.3d 815, 821 (6th Cir. 2000).

In its opinion, the trial court has admitted this impermissible invasion of the jury's province, observing, as part of its memorandum opinion, that part of its analysis involved "weighing the evidence." (App. 14a-16a) The trial court again referred to the same impermissible inquiry when it stated that "the weight of the trial evidence [demonstrated] that his reliance was not reasonable." (App. 20a-21a) This weighing of the evidence by the court, a full year after it was weighed properly by the Jury, as was the Jury's function, not the court's, apparently misled the court into erroneously overturning the Jury's verdict.[4]

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[4] The trial court also erroneously challenged the law on Mr. Davis's misrepresentation claim which had been established correctly by Chief Judge Heyburn, who had the benefit of studying the parties' summary judgment motions and hearing oral argument on them when they were filed. Judge Heyburn

The trial court analyzed the unanimous jury verdict finding for Mr. Davis and somehow concluded that "there exists no testimony in the record that explicitly pertains to the reasonableness of Mr. Davis's reliance on Mr. Spotts' oral representations regarding his commission structure." (App. 20a-21a) The trial court ignored all of the testimony that supported the Jury's finding of reasonable reliance, even stating the court's newly mistaken belief that testimony on dual commissions was not duplicated by other witnesses, when it clearly was. (App. 91a-92a) Former Regional PSE Kurt Sieter testified (emphasis added):

> **Q. If a sale was made on product that was involving a hospital, as you described, or a hospital complex, as you described, that has its base where you are and has its -- and also has product being placed in California, would you get your commission on that product and the regional PSE in California get his commission on that product?**
>
> **A. Yes.** The original PSE in California would get whatever amount of that order was to be placed in their territory. In fact, there's a provision in the plan that talks about, you know, where it's being placed and what the provision is for the guy that sells it versus the

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determined that the Plaintiff's misrepresentation claim should be heard by a jury, allowing the claim to go forward after lengthy, and, for the Plaintiff, successful litigation, to a positive jury verdict. The trial court wrongly criticized this prior ruling allowing the misrepresentation claim to go forward, and took the unanimous Jury verdict away from Mr. Davis. (App. 18a-20a)

guy who has to, you know, install it and support it after the fact.

Former Regional PSE Bryan Poteet testified:

Q. Was it uncommon for Siemens to pay double commissions to its sales people in the IM division?

A. Define double commissions. I mean, if a transaction went down the way Siemens organized was, if the AE and the PSE would be paid on a deal, so they would pay a sales guy and they would pay what would be the product guy. So that's the structure of Siemens. So, if you're saying two individuals getting paid for the same transaction, the answer is, yes.

Q. And they were being paid on the same sales dollars?

A. Same sales dollars.

Q. What would you call that, a dual commission?

A. I mean, I don't know if it's called dual commission or not. The reality is, if a transaction went down, **both people received an amount of money for that transaction**. Their scale is different from our scale.

(App. 79a-80a) (Emphasis added.)

Similar testimony was elicited from Regional PSE Christie Whelan, via her deposition testimony, which was read into the record at trial:

> Q. And if there were sales dollars that were generated by an account executive in your area, you would receive commissions on those sales dollars as well; correct?
>
> A. For IM solutions, correct.
>
> Q. Right. The account executive would receive commissions and you would receive commissions.
>
> A. That's correct.
>
> ....
>
> **Q. Were there times when you were doing all of the work on an IM sale and an account executive got a commission on it?**
>
> **A. Yes.**

(App. 92a-93a) (Emphasis added.)

Comparable testimony was also read at trial from the deposition of former Regional PSE Winn Corder, who testified:

> **Q. Okay. Have you ever been paid a commission on a sale that you were not personally responsibly -- or personally and directly responsible for?**

A. Oh, yeah.

(App. 93a-94a) (Emphasis added.)

Testimony introduced at the trial of this matter established, many times over, that dual commissions were paid, and known to be paid, by Siemens to its employees. The trial court's failure to recollect all of this critical testimony may be a function of waiting over a year after the jury's verdict to rule on the Defendant's motion, by which time the court's recollection was just not as fresh or comprehensive as it had been at the time of the trial, and with the entire weekend to reflect on Siemens' anticipated motion for directed verdict. This testimony, coupled with the representations of Mr. Spotts', the National Sales Manager for Siemens, who had not previously lied to Mr. Davis, that he would receive commissions on all sales under national accounts, provided more than sufficient support for the Jury's conclusion that Mr. Davis's reliance was reasonable. (App. 97a-99a)

Mr. Davis's reliance also was reasonable, among other things, because he explicitly testified at trial that he had never before had problems with, or been lied to by, Mr. Spotts, the Siemens National Sales Manager, the top sales executive for the company, with obvious apparent authority and competence to make such promises. (App. 108a-110a) Mr. Davis reasonably relied on these promises of Mr. Spotts, not only because of Mr. Spotts' previous honesty with Mr. Davis, but because Mr. Davis knew of other commissions paid (e.g., as cited above, $500,000 for a *Regional* PSE, while Mr. Davis was the company's first *National* PSE). These promises were reasonable, given the difficulty and risk entailed in this brand

new, national-scope, critical job Mr. Davis was being asked to get up on the stage and accomplish:

> Q. I understand you don't expect there to be a cap, but at the same time, you probably have in your mind some sort of expectation about what you might get?
>
> A. I knew what other sales people were making, people that I had trained, people that had much smaller territory. So, yeah, I knew there was great potential there, yeah, there's no doubt about it.

(App. 110a-111a)

Mr. Davis also testified at trial that he would not have accepted this new position if he had thought he was going to have to *split* commissions with the Regional PSEs and local AEs, because he did not want to be in direct competition with long-time colleagues with whom he was supposed to be making a joint, complimentary effort on the national level, and because he was certain that that structure would undermine the company's GPO sales. (App. 98a-99a) This fact also demonstrated that Mr. Davis was reasonably relying on being paid in the manner in which he testified Mr. Spotts promised Mr. Davis he would be compensated - that is, commissions on all sales to national accounts in a dual, i.e., override manner, that would not reduce commissions to the regional PSE's or local AEs. (Id.)

Mr. Davis understandably, predictably, and reasonably relied upon his high-level manager, Doug Spotts. The fact that Mr. Spotts was the Siemens

National Sales Manager alone was sufficient to justify the Jury's finding of Mr. Davis's reasonable reliance on Mr. Spotts' word. (App. 108a-109a) Mr. Spotts, as the NSM, was well aware of the amount of sales which could be made under the IM Division's National and Government Accounts, and upon which sales he represented Mr. Davis would be earning commissions:

> Q. Now, do you think Mr. Spotts said whatever he said to you incidentally without intention of lying, but simply because it wasn't clear on how to pay you in performing this new job?
>
> A. **Doug Spotts was a *national sales manager*. He knew what the numbers were.** He gave me a job, gave me a compensation plan.

(App. 108a-109a) (Emphasis added.)

Furthermore, contrary to the district court's strained reasoning in its Memorandum Opinion on the Motion for Judgment as a Matter of Law, there is a very logical and reasonable basis for the jury's award of $200,000, rather than $1.77 million, and such an award does not discredit Mr. Davis's reasonable reliance on the representations that were made to him. In its jury instructions the trial court informed the Jury that "[t]his is not a case of breach of contract. Accordingly ***you are not being asked to decide whether Siemens Medical Solutions breached the terms of its written commission plan with Mr. Davis***." (App. 126a-127a) (Emphasis supplied.) Because the district court instructed the jury that the contract claim had been previously decided, it is

reasonable to assume that the jury, while concluding that Mr. Davis was reasonable in understanding that he would receive commissions under the plan, used a different measure of damages for Siemens' misrepresentation, i.e., for what lesser amount Mr. Davis (or they) still would have taken the job on. During cross-examination by counsel for Siemens, Mr. Davis testified that he would have taken the position of Product Sales Executive for less than $1.77 million. (App. 104a-106a) Siemens also brought on numerous Regional PSEs to testify to the amount of commissions they made during that fiscal year of 2003. Those amounts ranged between roughly $130,000 and $500,000. (App. 74a-76a, 82a-84a, 90a-92a) Based upon the testimony of Mr. Davis and these Regional PSEs, coupled with the trial court's explicit jury instructions to ignore the contract, it was neither inherently illogical nor unreasonable for the jury to have found $200,000 was an amount of compensatory damages they would award Mr. Davis on his isolated misrepresentation claim.

b. The Defendant Siemens has not met and cannot meet its burden of showing a complete absence of proof as to the elements of Mr. Davis's misrepresentation claim.

Mr. Davis provided proof to the jury of all elements of his claim of misrepresentation. The elements of such a claim are: "1) a material misrepresentation; 2) which is false; 3) known to be false or made recklessly; 4) made with inducement to be acted upon; and 5) acted in reliance thereon and causing injury." Denzik v. Denzik, 197 S.W.3d 108, 110 (Ky. 2006).

The proof provided by Mr. Davis was "developed by the character of the testimony, the coherency of the entire case, as well as the documents, circumstances, and facts presented." UPS v. Rickert, 996 S.W.2d 464,468 (Ky. 1999). The Defendant itself has not disputed that the representation was material or that Mr. Davis suffered injury. (App. 70a-72a)

Among other things, the elements of misrepresentation may be established by wholly circumstantial evidence. UPS v. Rickert, 996 S.W.2d 464,468 (Ky. 1999); Grant v. Wrona, 662 S.W.2d 227, 229 (Ky. App. 1983). Even if it were to be accepted as true that Mr. Davis could not offer direct evidence of the intent to deceive, Mr. Davis offered at trial a good deal of circumstantial evidence to prove that Mr. Spotts intended to deceive him. As established by Kentucky precedent, a finding of misrepresentation can rest entirely on such circumstantial evidence. Id.

Mr. Davis offered substantial evidence to the jury that a misrepresentation was made to him by Mr. Spotts, as fully outlined in the Statement of the Facts, supra, regarding the assignment of Mr. Davis to, and the opportunity for the receipt by him of dual commissions on, National and Government Account sales for the IM Division, with his nationwide territory. (App. 97a-99a) Mr. Davis reiterated under both direct and cross examination the false statements that were made to him by Siemens National Sales Manager:

> Q. Did Mr. Spotts say anything to you about what dollars you would be paid on and what relationship your commissions would have to

the other product, the regional product sales executives?

A. It would be paid on anything that was booked under national accounts. National accounts includes both Government and GPOs.

(App. 97a-98a)

Q. And did Mr. Spotts represent to you that these accounts would be – these national accounts would be subject to a commission paid to you on every dollar?

A. Yes.

(App. 98a-99a)

This testimony by Mr. Davis was falsely, and unconvincingly, contradicted by Mr. Spotts, who testified (but obviously without being believed by the jury who observed him testify) as follows:

Q. What would be his incentive? He was a salesman, correct?

A. Correct.

Q. And salesmen are incentivized by commissions at Siemens?

A. Correct. For the GPOs, his compensation was his base salary.

Q. And that's it. There is no commission incentive for him to do this work on the GPOs, according to your testimony?

A. That's correct.

(App. 118a-120a)

The Jury, properly using their reasonable minds, could and did believe the credibility and testimony of Wade Davis over that of Doug Spotts. The Jury found that Mr. Davis had been promised by Mr. Spotts, and was entitled to, commissions, after it listened to the frankly incredible testimony of Mr. Spotts.

Testimonial evidence was offered to the jury that the misrepresented assignment of responsibility for those accounts and that territory, and the promised commissions thereon, were material to Mr. Davis, as the following question put to Mr. Davis and his answer at trial confirmed:

Q. So, a 35,000 dollar raise wouldn't have been enough?

A. Not for that job, no.

(App. 98a-99a, 104a-105a)

Q. Maybe you would have been happy with $150,000?

> A. No, I would never be happy being told what a cap would be and that's not why you go into sales.

(App. 111a)

This testimony also constituted convincing evidence that Mr. Davis acted in reliance on these promises, taking on greater responsibility and risk with this new position, in exchange for the possibility of substantial commissions. This reliance was reasonable, as discussed in section 2, above.

Despite the above testimony, the lower courts ignored the holding in Hanson, and found that Mr. Davis's reliance upon Mr. Spotts promises was unreasonable as a matter of law. The lower courts' decisions have made reliance upon a promise unreasonable as a matter of law due to a writing, which is directly contrary to the precedent established by the Kentucky Supreme Court in Hanson. Cf. UPS v. Rickert, 996 S.W.2d 464, 471 (Ky. 1999).

Mr. Davis was not paid his promised commissions on National and Government Accounts, as both his pay statements and his testimony established for the jury:

> And basically just described that I can't get my name in the system to get paid because it's showing, you know, the local PSE. So, it wasn't a direct relation to the conversation I had, but it was -- the fact was still that if my name went in, I was going to bump the local sales guy and that was not what we agreed to.

(App. 99a-101a)

The falsity of Mr. Spotts' representations is also evidenced by his testified-to statements to the Siemens Product Sales Executives that their commissions would not be split with Mr. Davis, which assertion was openly contradicted by Mr. Spotts' deposition and trial testimony (which, furthermore, were even inconsistent with each other). The testimony of numerous other PSEs within Siemens was that, at a minimum, Mr. Spotts stated on a conference call that Mr. Davis's new position would not effect their commissions. (App. 75a-82a, 84a-90a, 92a-93a)

There certainly was not a complete absence of evidence upon which a reasonable jury could find that Siemens' NSM Spotts knowingly, or in reckless disregard of their falsity, made false statements to Mr. Davis about his assignment and commissions. As demonstrated above, the testimony of Mr. Davis and Mr. Spotts differed dramatically on the issue of what Mr. Davis was told regarding his assignment and commission opportunity. (App. 96a-98a)

Bryan Poteet, a regional PSE for Siemens at the time of Mr. Davis's tenure there, testified that, during a conference call, Mr. Spotts communicated to him and other PSEs that Mr. Davis's Commission Plan would not effect the ability of PSEs to earn their commissions:

> Q. Do you recall if during this telephone conference where Mr. Spotts had announced Mr. Davis's new role, do you recall if Mr. Davis's entitlement to earn commissions was discussed?
>
> A. It was basically – when it was announced that he would be in a sales role, you know, the

first question out of any sales guys mouth is how is that going to impact my commission? So, is that going to be – is that going to impact my commission? And the comment back was, it would not impact the local PSE's commission.

Q. Mr. Spotts told you that it would not impact – Wade Davis's commission would not impact –

A. That was communicated in the call. You have twelve sales people on the call, everyone of them want to know point number one, is it ever going to impede my dollar?

Q. Okay. Was it you understanding that Mr. Davis would be able to earn commissions of – as a result of this phone conference, that he would be able to earn commissions as a PSE for national accounts?

A. Yes.

(App. 79a)

Mr. Kurt Seiter, also a former PSE with Siemens, testified he was present on the same conference call, and that, in fact, Mr. Spotts stated Mr. Davis's commission structure would not effect the commissions of other PSEs:

A. Well, as sales people you can imagine that we're all very keen to have an understanding of how something like this might impact our own commission. ... If Wade is working on a project and dealing with a national account, does that somehow impact our own commission? Are we

> somehow going to have to give or will we be receiving less of a percentage on a deal because Wade would also be receiving a percentage on a deal. And the response to that was, you know, no.

(App. 87a-88a)

The jury witnessed Mr. Spotts' complete failure to answer straightforward questions regarding problems with Mr. Davis's change in title and pay structure as the new National PSE, and heard Mr. Spotts' self-serving reversal of his own deposition testimony on the latter point. (App. 111a-116a)

In fact Mr. Spotts contradicted testimony he had given only minutes earlier on the stand, regarding the existence of an Ultra Sound Group within Siemens. App. 123a-134a Mr. Spotts reversed his testimony before the Jury when faced with the hard, and still unanswered, question of why Mr. Davis was, unknown to him at the time, improperly placed in the Siemens' computer program as a PSE in the *Ultra Sound Group*. In that group, the testimony at trial confirmed, **Mr. Davis was prevented from receiving any commissions at all**. (App. 124a-134a)

Mr. Spotts certainly knew that Mr. Davis would not take the position without Mr. Spotts' promise of a dual commission on National Account sales. The Jury reasonably concluded that Mr. Spotts used the false promises to induce Mr. Davis to take on this demanding and critical position at a difficult time in the IM Division's history. (App. 98a-99a, 104a-105a)

The district court ignored clear Kentucky case law on the common law of fraud and the Sixth Circuit affirmed this error. The lower courts incorrectly reasoned that the ambiguous language of Mr. Davis's written stock Commission Plan made Mr. Davis's reliance on fraudulent promises from Doug Spotts, Siemens' National Sales Manager, unreasonable as a matter of law. This conclusion does not comport with the standard set forth by the Kentucky Supreme Court in Hanson, and violates the lower courts' responsibilities to properly apply the law of Kentucky in a diversity case.

CONCLUSION

For all of the above reasons, Mr. Davis respectfully requests that this Court grant this Petition for Writ of Certiorari and affirm the Constitutional principles of Federalism that bind the Federal courts.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-5420

[Filed May 28, 2008]

JERRY W. DAVIS,
Plaintiff-Appellant,

v.

SIEMENS MEDICAL SOLUTIONS USA, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

Before: KEITH, DAUGHTREY, and ROGERS, Circuit Judges.

PER CURIAM. In this diversity action for breach of an employment contract, plaintiff Jerry Wade Davis alleged that his former employer, defendant Siemens Medical Solutions USA, Inc., was liable for approximately $1.77 million in sales commissions that Davis claimed were unjustly withheld by the defendant. He also sought damages based on other

state law claims – specifically, conversion, promissory estoppel, fraudulent misrepresentation, intentional infliction of emotional distress, unpaid wages, and breach of fiduciary duty.

After affording the parties extensive discovery, the district court granted summary judgment to Siemens on all but Davis's claim of fraudulent misrepresentation. *See Davis v. Siemens Med. Solutions USA, Inc.* (*Davis I*), 399 F. Supp.2d 785 (W.D. Ky. 2005). In denying summary judgment to the defendant on that one cause of action, the district judge focused on a factual dispute about whether Douglas Spotts, Siemens's national sales manager in the company's Image Management Division, had informed Davis that if he accepted a position as product sales executive, the company would pay him commissions on national sales made by other Siemens sales agents who reported to Davis.

Consequently, the fraudulent-misrepresentation claim was tried by a jury at a trial presided over by a magistrate judge because the district judge was confronted with "an unanticipated scheduling conflict." At the conclusion of four days of trial, the jury returned a verdict in favor of Davis on the misrepresentation claim, awarding him $200,000 in compensatory damages but no punitive damages. Post-verdict, Siemens filed a renewed motion for judgment as a matter of law, a motion that the magistrate judge later granted, ruling that, under principles of Kentucky law, Davis could not have *reasonably* relied upon any representations made by Spotts that were in contravention of the unambiguous, written language contained in the Siemens Compensation and Commission Plan under which Davis was hired. *See*

Davis v. Siemens Med. Solutions USA, Inc. (*Davis II*), No. 3:04CV- 195-MO, 2007 WL 710133, at *4 (W.D. Ky. Mar. 6, 2007). Davis now appeals that posttrial decision, those portions of the district court's summary judgment order that were adverse to him, and certain evidentiary rulings made by the magistrate judge prior to and during trial.

The Summary Judgment Ruling

In addressing the defendant's claims for breach of contract, conversion, promissory estoppel, intentional infliction of emotional distress, and breach of fiduciary duty, the district judge expertly outlined the facts relevant to the dispute, provided a full exposition of the case law relevant to any decision on the matter, and accurately applied that law to the facts presented. Indeed, insofar as the decision in *Davis I* addresses the allegations of breach of contract, conversion, promissory estoppel, intentional infliction of emotional distress, and breach of fiduciary duty, any additional discussion of those claims by this court would be merely duplicative and would serve no useful purpose. We therefore affirm the grant of summary judgment to Siemens based upon the reasons set out by District Judge Heyburn in *Davis I*, reported at 399 F. Supp.2d 785.

Grant of Judgment as a Matter of Law

Similarly, Magistrate Judge Moyer's treatment of Siemens's post-trial motion for judgment as a matter of law accurately identified, explained, and applied the law relevant to Davis's claim of fraudulent misrepresentation. In that decision, the magistrate judge correctly noted that the district court's earlier

denial of summary judgment on this ground was based upon the court's assumption that a genuine dispute existed as to whether Douglas Spotts made the representation concerning the payment of commissions that is alleged by the plaintiff. As emphasized by the magistrate judge, however, even if such a representation had been made by Spotts, Davis could not have reasonably relied upon that promise, given the clear contract language to the contrary. For the reasons discussed in Magistrate Judge Moyer's memorandum opinion dated March 6, 2007, we also affirm the district court's decision granting Siemens judgment as a matter of law on the claim of fraudulent misrepresentation.

Claim of Unpaid Wages (K.R.S. § 337.385)

In the summary judgment decision, the district court dismissed Davis's claim for lost wages under Section 337.385 of the Kentucky Revised Statutes because "Davis did not pursue his necessary administrative remedies before initiating his lawsuit." Subsequently, however, the plaintiff moved the court to revise its decision in light of a Kentucky Supreme Court decision overruling prior precedent that required such an administrative exhaustion. *See Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 362 (Ky. 2005). The district judge granted that motion and filed a supplemental memorandum that again granted summary judgment to Siemens on this issue, this time on the alternate ground that the commissions were not "wages" because "Kentucky imposes no statutory duty to provide an override commission" and because Davis had not established that the commissions had been "agreed upon . . . or provided to employees as an established policy." Ky. Rev. Stat. § 337.010(1)(c).

To the extent that Davis's statutory wage claim is based upon the failure of Siemens to pay the plaintiff *commissions* that he believes he is due, the district court's breach of contract analysis in *Davis I* is applicable and fatal to the plaintiff's claim. To the extent that Davis's statutory claim is based upon the failure of the defendant to pay the entire *base salary* promised in the company's guarantee rider, we are informed by counsel that the issue has been resolved out of court to the satisfaction of both parties.

Evidentiary Determinations

On appeal, Davis also challenges the magistrate judge's trial rulings that excluded evidence of mistreatment of Davis and of other Siemens employees at the hands of a management official *not* involved in the salary negotiations with Davis and also excluded evidence that the defendant failed to provide the plaintiff with a company car, as promised in a letter offering the product sales executive position to Davis. These and all challenges to evidentiary determinations at trial are reviewed on appeal only for an abuse of discretion. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997).

The magistrate judge's exclusion of evidence of alleged mistreatment suffered by Davis and by other Siemens employees at the hands of manager Thomas Riesenberg was proper. First, the sole remaining cause of action at trial was the plaintiff's claim of fraudulent misrepresentation, an alleged wrong that occurred when national sales manager Douglas Spotts, not Riesenberg, supposedly made certain promises to Davis. The fact that Riesenberg may have "mistreated" the plaintiff approximately a year later might have

been relevant to the already-dismissed claim for intentional infliction of emotional distress, but it had no relevance whatever to the inquiry of whether Spotts knowingly deceived Davis when discussing the job's payment scale with the plaintiff. Furthermore, Davis is unable to point to any testimony supporting a conclusion that Riesenberg had any role in the initial conversations with the plaintiff about the salary associated with the product sales executive position. Because evidence of alleged mistreatment of Davis or of other employees by *Riesenberg* is of no consequence to the determination of whether *Spotts* fraudulently misrepresented information to the plaintiff, such testimony was thus irrelevant to the misrepresentation claim before the jury and was properly excluded. *See* Fed. Rule of Evid. 401.

Likewise, the decision of the magistrate judge to disallow testimony regarding the failure of the employer to provide Davis with a company car was not reversible error. Although a letter from the defendant dated November 11, 2002, provided that it would "provide a car for your use in accordance with Siemens Company Car Policy," Davis later disavowed any claim to a company car. During his deposition testimony, the following exchange occurred between the plaintiff and defense counsel:

> Q. Are you claiming in this lawsuit that you were entitled to a company car while you worked as a product-sales executive?
>
> A. As were all of us [phonetic], I was entitled to one; but I don't think I'm claiming it in my suit. No.

Q. You're not asking for any damages because you didn't get a company car?

Mr. Bishop: Object, insofar as it calls for a legal conclusion.

Ms. Settle: You can answer it.

A. No.

Having asserted that the request for a company car was no longer part of his contract claim, Davis cannot now seek to resurrect that claim. Consequently, any error in the decision of the magistrate judge to exclude testimony relevant to that issue is harmless.

For the reasons set out above, we AFFIRM the judgment of the district court, including both the order granting summary judgment to the defendant and the order granting judgment as a matter of law to the defendant.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 3:04CV-195-MO

[Filed March 6, 2007]

JERRY W. DAVIS
PLAINTIFF

V.

SIEMENS MEDICAL SOLUTIONS USA, INC.
DEFENDANT

MEMORANDUM OPINION

Following a verdict in favor of the plaintiff, Jerry W. Davis, Siemens Medical Solutions USA ("Siemens") renewed its motion for judgment as a matter of law and, in the alternative, asked for a new trial (*see* docket no. 114). It is rare for a court to grant such a motion in a civil matter, particularly with respect to an issue that has been adjudicated by a jury. Yet, after reviewing Siemens' motion and Mr. Davis's response thereto, reviewing the trial transcripts, and considering prior rulings made in this matter, this court concludes that Mr. Davis's fraud claim fails as a matter of law and, accordingly, there existed no legally

sufficient basis for the jury to find that Mr. Davis reasonably relied on any misrepresentations made by Siemens.

The court has not reached this decision lightly, without being mindful of the doctrine of the law of the case, nor without considerable concern about possibly invading the province of a jury. Nevertheless, when this court has erred as a matter of law, or a jury has reached a decision that is against the clear weight of the evidence, a judge must correct any errors and ensure that justice is served.

I.

All facts underlying this case were well-summarized in the district court's memorandum opinion disposing of all but one of Mr. Davis's claims. *See* docket no. 56, reported as *Davis v. Siemens Medical Solutions USA, Inc.*, 399 F. Supp. 2d 785 (W.D. Ky. 2005). Accordingly, this court will restate in this opinion only those facts relevant to an understanding of Siemens's present motion.

In the fall of 2002, Siemens offered Mr. Davis, who was then one of its Division Marketing Specialists, a sales executive position. Although he had worked for Siemens as a commission-earning salesperson in the past, Mr. Davis's position at the time of the offer was salaried, with an annual compensation of $85,000. The compensation for the new position he was offered was once again commission-driven, with a lower base salary of $65,000, a one-year guaranteed salary rider of $35,000 (the "Guarantee Rider"), and the opportunity to earn commissions on certain sales.

The offer was verbally communicated to Mr. Davis in September 2002 during a meeting between him and Mr. Douglas Spotts, one of Siemens's National Sales Managers. Siemens confirmed its offer in a writing dated November 11, 2002, which expressly incorporated the Guarantee Rider, which in turn incorporated Mr. Davis's Compensation and Commission Plan (the "Plan") that described the basis by which his commissions would be calculated. On November 14, 2002, Mr. Davis confirmed in writing his acceptance of the offer letter, the Guarantee Rider, and the Compensation and Commission Plan.

The parties agree that Mr. Davis was assigned a national territory and that his Compensation and Commission Plan states that Mr. Davis would earn commissions only on those sales within his territory for which he was "personally and directly responsible." Prior to trial, Mr. Davis argued that the phrase "personally and directly responsible" was ambiguous and could be interpreted, particularly with the aid of parol and other extrinsic evidence, to entitle Mr. Davis to commissions on sales for which he did not have direct and unmediated involvement. *See Davis*, 399 F. Supp. 2d at 792. The district court disagreed with Mr. Davis's assertion of ambiguity, and ruled that the phrase "personally and directly responsible" is "absolutely clear and unambiguous" and that its meaning within the context of the Compensation Plan "is not subject to serious dispute." *Id.* at 792-93. Accordingly, the district court dismissed with prejudice all claims for which Mr. Davis's advocated interpretation of the Compensation and Commission

Plan's terms was necessary (in whole or in part) for him to prevail.[1]

The district court permitted only one claim to survive summary judgment – whether Siemens fraudulently misrepresented the terms of Mr. Davis's commission structure to induce him to accept his new job. Mr. Davis asserted that Mr. Spotts promised him that he would receive commissions on all sales made to national accounts, regardless of whether he was responsible for securing the sale. As noted previously, the Compensation and Commission Plan Mr. Davis accepted says no such thing, and cannot reasonably be interpreted otherwise. Yet, because Siemens denied making the alleged misrepresentation, the district court determined that a question of fact existed with respect to Mr. Davis's fraudulent misrepresentation claim, because one of six necessary elements[2] of a fraud claim is the making of a materially false statement. *See Davis*, 399 F. Supp. 2d at 800. The district court did not evaluate in any detail the other necessary elements of the fraud claim, except to note that Mr. Davis alleged that he relied on the misrepresentation and that Mr. Davis appeared to

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[1] The district court also dismissed Mr. Davis's claims for breach of fiduciary duty and intentional infliction of emotional distress.

[2] The elements of a fraudulent misrepresentation claim in Kentucky are (1) a representation of a material fact; (2) that was false; (3) that the defendant either knew was false, or made recklessly; (4) that was made to induce the plaintiff to act upon it; (5) that was reasonably relied upon; and (6) that resulted in damages to the plaintiff. *See, e.g., United Parcel Service Co. v. Rickert*, 966 S.W.2d 464, 468 (Ky. 1999); *Vest v. Goode*, 209 S.W.2d 833, 836 (1948); *see also Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1447 (6th Cir. 1993).

meet "the bare minimum for a *prima facie* case of misrepresentation." *Id.* Notably, the district court did not explicitly evaluate whether Mr. Davis *reasonably* relied on the misrepresentation.[3]

On the eve of trial, and facing an unanticipated scheduling conflict, the district court asked the parties to consider allowing a magistrate judge to preside over the trial of this matter. They did and, accordingly, the trial judge was not the same judge who had previously evaluated the merits of Mr. Davis's claims and made rulings on all pre-trial motions, including Siemens's motion for summary judgment. Thus, when Siemens moved for directed verdict at the close of its proof, the trial judge was reluctant to disturb what he considered

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[3] An argument can be made that the district court did evaluate whether Mr. Davis's reliance was reasonable and determined that it was not. One of Mr. Davis's alternate theories of relief was that he was entitled to recover the commissions allegedly promised him on the theory of promissory estoppel. To succeed, such a claim would also require proof of *reasonable* reliance. *See Davis,* 399 F. Supp. 2d at 795. The district court dismissed Mr. Davis's claim of promissory estoppel on the following basis, however:

> Promissory estoppel is meant for cases in which a promise, not being supported by consideration, would be unenforceable under conventional principles of contract law. When there is an express contract governing the relationship out of which the promise emerged, and no issue of consideration, there is no gap in the remedial system for promissory estoppel to fill.

Id. at 798. The court did not explicitly evaluate whether any reliance on Mr. Spotts's promise was reasonable, but its rejection of Mr. Davis's promissory estoppel claim is consistent with this court's conclusion that there should be no extra-contractual recovery by Mr. Davis.

to be the law of the case, as established by the district court in its prior evaluation of Siemens's motion for summary judgment, and without the aid of contemporaneous trial transcripts, concluded that there existed one or more issues of fact requiring the jury's determination.

II.

Post-trial Siemens requests two alternative forms of relief. Siemens principally asks the court to reconsider its denial of Siemens's motion for judgment as a matter of law, and asks the court to set aside the jury's determination that Siemens made a fraudulent misrepresentation to Mr. Davis. Failing that, Siemens asks for a new trial because certain of the statements and evidence pertaining to alleged mistreatment of Mr. Davis by Tom Riesenberg, one of his superiors at Siemens, may have tainted the jury's verdict. In this court's opinion, the latter argument is not sufficiently meritorious to warrant extensive consideration.[4]

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[4] The court is not convinced that any such evidence was improperly or erroneously admitted, or, if so, that Siemens did not waive its right to object. This is not to say, however, that any evidence pertaining to the alleged behavior of Mr. Riesenberg did not affect the jury. Although the claim at trial sounded in tort, the jury chose not to award punitive damages and, accordingly, the method of measuring Mr. Davis's damages was the same as if he had proceeded on a breach of contract action. In other words, the jury was instructed to award Mr. Davis the benefit of his alleged bargain, namely the amount to which he would have been entitled had the promise allegedly used to induce Mr. Davis to accept his new position been true. *See* Jury Instruction No. 2 (docket no. 109). If the promise that Mr. Davis would earn commissions on all sales made to national accounts were true, the evidence was uncontroverted that he would have been entitled to over 1.5

Siemens's principal request, however, both warrants *and has received weighty and careful consideration.*

Federal Rule of Civil Procedure 50(a)(1) states that judgment as a matter of law is not proper unless "no reasonable juror could have found for the non-moving party." Similarly, it has long been the rule in the Sixth Circuit that the same standard applies to a renewed motion for judgment as a matter of law filed after the return of a jury verdict. *See, e.g., United States v. Alpine Industries, Inc.*, 352 F.3d 1017, 1022 (6th Cir. 2003)(citations omitted). In applying this standard, however, the court cannot weigh the credibility of the witnesses or substitute its judgment for that of the jury. *Id.* Rather, it must view the evidence in the light most favorable to the non-moving party (*i.e.*, Mr. Davis) and give him the benefit of all reasonable inferences. *Id.*

Before weighing the evidence, however, the court must first address what Mr. Davis was asked to prove to the jury. In civil cases, the plaintiff is typically

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million dollars. *See, e.g.*, Not. of Reduction of Sought Damages (docket no. 104); Tr. vol. II-B at 39-40. The award thus should have been all or nothing. Based on the claim and sales figures presented, there simply was no evidentiary support for any other damages calculation. Inexplicably, however, the jury awarded Mr. Davis $200,000 in compensatory damages. One could interpret this figure as suggesting that the jury did not find Mr. Davis's fraud claim fully credible, yet felt he was owed something for his alleged mistreatment by his supervisors at Siemens. Whether this interpretation is accurate or not, one can never know. The court simply notes that there is no readily apparent logical basis for the jury's damages calculations, and thus Siemens's' alternate argument, while not legally viable as presented, may not be entirely misplaced.

asked to prove his claim by a preponderance of the evidence. The preponderance standard is relatively low – it simply means that a particular claim is more likely than not. By contrast, a plaintiff alleging fraudulent misrepresentation, bears the heightened burden of proving his case by "clear and convincing evidence." *See, e.g., United Parcel Service Co. v. Rickert,* 966 S.W.2d 464, 468 (Ky. 1999). Kentucky's highest court, to which this court must turn for a definition of that standard,[5] has declared that "'proof by clear and convincing evidence' is incapable of a definition any more detailed or precise than the words involved," but requires the party with the burden of proof "to produce evidence substantially more persuasive than a preponderance of the evidence, but not beyond a reasonable doubt." *Fitch v. Burns*, 782 S.W.2d 618, 622 (Ky. 1990).

The jury was asked to determine whether Mr. Davis had proven each of the following six necessary elements of his claim by clear and convincing evidence:

(1) That Siemens made a representation of a material fact to Mr. Davis;

(2) That the representation was false;

(3) That Siemens either knew the representation was false or made it recklessly;

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[5] This is a diversity case and, accordingly, Kentucky's substantive law governs the analysis and interpretation of the legal sufficiency of his state-law claim of fraud. *See, e.g., Moore, Owen, Thomas & Co. v. Coffey*, 992, F.2d 1439, 1444 (6th Cir. 1993).

(4) That Siemens made the representation to induce Mr. Davis to act upon it (in other words, that Siemens intended to deceive Mr. Davis);

(5) That Mr. Davis acted in reasonable reliance on the representation; and

(6) That Mr. Davis suffered damages as a result.

See Jury Instruction No. 1 (docket no. 109). In its post-trial motion Siemens does not dispute that the evidence was sufficient to establish, clearly and convincingly, that it made a representation of a material fact to Mr. Davis or that he would have suffered damages if his claim of fraud was sustained by the jury, and it does not contest (presumably for the purposes of the motion) that the statement was false. Rather, it asserts that Mr. Davis failed to prove by clear and convincing evidence the third through fifth enumerated elements of the claim above.

The court will assume, for the sake of argument only, that Mr. Davis sufficiently proved at trial the third and fourth elements of his fraud claim (*i.e.*, that Siemens knew that Mr. Spotts's alleged oral representations regarding Mr. Davis's commission structure were false and that Siemens intended to deceive Mr. Davis into accepting its offer of employment, which included the Commission and Compensation Plan that contained a commission structure quite different from the one Mr. Spotts verbally described). The court makes these assumptions because it is convinced that Mr. Davis did not, as a matter of Kentucky law, establish that Mr.

Davis *reasonably* relied on Siemens's misrepresentations

III.

It has long been the rule in Kentucky that there can be no reasonable reliance on any misrepresentation that a party knows or should have known is inaccurate. *See Mayo Arcade Corp. v. Bonded Floors, Co.*, 41 S.W.2d 1104 (Ky. 1931). The corollary to that rule – namely that as a matter of law there can no be no misrepresentation of any issue that is contradicted by the terms of a written contract – is also a venerable part of Kentucky law, and is precisely applicable in this matter. *See, e.g., id; Vest v. Goode,* 209 S.W.2d 833 (Ky. 1948).

Mr. Davis asserts that Mr. Spotts orally promised him that he would receive commissions on all sales made to national accounts, regardless of whether he or another salesperson was directly responsible for making the sale.[6] The Compensation and Commission Plan subsequently sent to and accepted by him, however, stated only that he would receive commissions on sales for which he and he alone was personally and directly responsible. At the time Mr. Davis accepted his written offer, and its corresponding Commission and Compensation Plan, he apparently labored under the misperception that there was no conflict between the oral representations and the

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[6] Mr. Spotts testified that he told Mr. Davis that he would be paid according to the terms of the written plan. *See* Tr. vol. III-A at 79-80; Tr. vol. III-B at 83-84, 103. In construing the evidence in the light most favorable to Mr. Davis, however, the court will disregard this testimony.

written Plan.[7] As the district court correctly determined in the ruling on summary judgment, this misperception was not reasonable, as the terms of the written Plan are both clear and unambiguous. If Mr. Davis was presented with a Plan whose commission structure could reasonably be interpreted in only one way, and that way directly contradicted the oral representations allegedly made by Mr. Spotts concerning his commission structure, it necessarily follows that Mr. Davis's reliance on the oral representations was not reasonable, once he was presented with, and accepted his written job offer.[8] Thus, pursuant to Kentucky law, and as a matter of law without regard to any other evidence that may have been presented at trial, his claim of fraudulent misrepresentation fails. *See Mayo*, 41 S.W.2d at 1108-1109; *Vest*, 209 S.W.2d at 58-59; *see also Moore*, 992 F.2d at 1447.

Given this determination, this court must now reconcile its current analysis of Mr. Davis's claim with the original judge's prior opinion that, at least implicitly, determined that the reasonableness of Mr. Davis's reliance was legally sufficient to proceed to trial. As noted previously, however, the district court did not explicitly evaluate any element of the fraudulent misrepresentation claim, except whether

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[7] *See* Tr. vol. II-A at 32-33; Tr. vol. II-B at 63; Tr. vol. III-A at 21; Pl's Resp. Mem. at 8 n.2 (docket no. 116).

[8] Although there is testimony that suggests that Mr. Davis may not have read his contract documents (*see* Tr. vol. IIB at 92, lines 4-5), in Kentucky, as elsewhere, a person is legally presumed to have read any contract he executes, *see, e.g.*, *Mayo*, 41 S.W.2d at 1109.

there existed a question of fact regarding the *making* of a false statement. Rather, the court's focus was on whether representations as to future conduct would support a fraud claim, and whether the claim was barred by the economic loss doctrine.

"The [law of the case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. Law of the case directs a court's discretion, [however,] it does not limit the tribunal's power." *Arizona v. California,* 460 U.S. 605, 618 (1983)(internal citations omitted). Application of the law of the case doctrine is a procedural issue to which federal law applies, *McDonald v. Petree,* 409 F.3d 724, 730 n.2 (6th Cir. 2005), and the Sixth Circuit has recognized that "the law of the case doctrine is discretionary when applied to a coordinate court or the same court's own decisions." *Bowling v. Pfizer, Inc.*, 132 F.3d 1147, 1150 (6th Cir.1998) (citing *United States v. Todd*, 920 F.2d 399, 403 (6th Cir.1990)); *see also In re Kenneth Allen Knight Trust*, 303 F.3d 671, 677-78 (6th Cir. 2002) (doctrine is discretionary when a court reviews its prior erroneous decision). Indeed, the Sixth Circuit has gone so far as to say, "[a]t the trial court level, the doctrine of the law of the case is little more than a management practice to permit logical progression toward judgment. Prejudgment orders remain interlocutory and can be reconsidered at any time." *Gillig v. Advanced Cardiovascular Sys.*, 67 F.3d 586, 592-93 (6th Cir.1995) (quoting MOORE'S FEDERAL PRACTICE ¶ 0.401 (2d ed. 1994)). Consequently, the law-of-the-case doctrine does not remove a trial court's jurisdiction to reconsider, or otherwise preclude a trial court from reconsidering, an issue previously decided in the case by another judge. *See id.* at 590.

Having reconsidered whether Mr. Davis's fraudulent misrepresentation should have survived summary judgment, this court concludes that it should not have. The claim is not viable (and was not viable at the time of the prior ruling) because the contract Mr. Davis read and accepted directly contradicted Mr. Spotts's prior oral promises with respect to a material fact (his commission structure) that constituted the particular inducement for Mr. Davis to accept his new job. In Kentucky, under these circumstances, there can be no fraudulent misrepresentation.

IV.

Even if Mr. Davis's fraud claim did not fail as a matter of law, however, the court would set aside the jury's verdict. As noted above, the applicable standard for doing so is whether any reasonable juror could have found for the plaintiff. The court does not suggest that the jury did not perform its duty carefully, but mere reliance is not sufficient to support Mr. Davis's claim, and there exists no testimony in the record that explicitly pertains to the *reasonableness* of Mr. Davis's reliance on Mr. Spotts's oral representations regarding his commission structure. In addition, there is scant other testimony that would clearly and convincingly permit a reasonable juror to find reasonable reliance.

Mr. Davis testified that he would not have taken the job without the potential to earn a significantly greater income than he currently made,[9] but that only establishes that he relied on the misrepresentation, not that his reliance was reasonable. Indeed, the

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[9] Tr. vol. II-A at 14, 23; Tr. vol. II-B at 53-54.

weight of the trial evidence that his reliance was not reasonable. Mr. Davis admitted that before he accepted his new job he received and read his offer and Compensation and Commission Plan, which offered him a substantially lower base salary than he was currently earning and included only a one-year guaranteed supplement to his salary that, in total, promised only a modest guaranteed increase in pay for a substantial increase in responsibility. Mr. Davis's fellow salespeople, whom he presented as witnesses, testified that salespeople at Siemens thoroughly knew their own Compensation and Commission Plans because those plans determined how much they would earn.[10] Moreover, the evidence clearly established that there was a monumental difference between the commissions Mr. Davis allegedly was promised if he would accept the job, and the commissions to which his written job offer contractually entitled him.[11] Lastly, Mr. Davis has previously worked as a salesman for Siemens, so the system could not have been new to him.[12]

Granted, there was testimony that "[d]eals go down all the time where salespeople have nothing to do with

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[10] *See, e.g.*, Tr. vol. I-B at 71-72. None testified that they knew the terms of Mr. Davis's Plan (*see, e.g.*, Tr. vol. I-B at 35, 81). They also testified that it would have been an "anomaly" for two product sales executives to earn commissions on the same sale (*see* Tr. vol. I-B at 38, 87).

[11] *See* Tr. vol. II-B at 53-54.

[12] *See* Tr. vol. I-B at 43.

a project coming in and they get paid,"[13] but that testimony was quite limited, was not elaborated on or duplicated by any other witness, and was contradicted by Mr. Davis's own admission that no one at Siemens ever told him that his eligibility for commissions would be different than what was expressed in the terms of his written Plan.[14] Accordingly, given that the contractual terms of Mr. Davis's Compensation and Commission Plan were clear and unambiguous with respect to his commission structure, there simply was not enough evidence to permit a reasonable juror to determine that Mr. Davis had met his heightened burden of clearly and convincingly proving that his reliance on Mr. Spotts's oral promises was reasonable once he reviewed the Plan.[15]

V.

This case should not have proceeded to trial and, having proceeded to trial, should have concluded with the granting of Siemens's initial motion for judgment as a matter of law. That did not happen and, once a

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[13] *See* Tr. vol. II-B at 70.

[14] *See* Tr. vol. II-B at 83.

[15] The court also notes with curiosity that plaintiff does not argue in his response to Siemens's post-trial motion that Mr. Davis's reliance was reasonable, except to state that it was in a section heading, and to make a passing reference in another section pertaining to the falseness of Mr. Spott's statement. *See* Pl's Resp. Mem. (docket no. 116). He points to no evidence that clearly supports this assertion and makes no direct argument. If he, with the aid of the written record, and the clarity of hindsight cannot establish the reasonableness of his own reliance, the court is hard pressed to determine how the jury could have done so.

jury has been allowed to reach its decision, that decision should not be overturned without a thorough and exacting review of the law and the record, coupled with careful, deliberate, and thoughtful consideration. That has now been done and the court finds that the jury's verdict should be set aside and judgment as a matter of law entered in favor of Siemens.

The court will enter a separate order consistent with this memorandum opinion.

DATE: March 6, 2007

/s/ James D. Moyer
James D. Moyer
United States Magistrate Judge

cc: counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:04CV-195-H

[Filed February 22, 2006]

JERRY W. DAVIS	)
PLAINTIFF	)
	)
V.	)
	)
SIEMENS MEDICAL	)
SOLUTIONS USA, INC.	)
DEFENDANT	)
	)

ORDER

Both parties have filed motions in limine to exclude evidence pursuant to Fed. R. Evid. 403. The Court has considered the parties' briefs and the relevant depositions and exhibits in the record.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendant's motions to exclude: (1) evidence that Thomas Riesenberg ("Riesenberg") mistreated the Plaintiff, Jerry Davis ("Davis"); (2) evidence that the Defendant

made errors in the payment of other employees' commissions and corrected them after substantial delay; and (3) evidence of the Defendant's DINS-PAC II contract with the Department of Defense are DENIED.

IT IS FURTHER ORDERED that Defendant's motions to exclude: (1) evidence that Riesenberg mistreated other Siemens employees; (2) evidence that the Defendant failed to provide Davis with a company car; (3) evidence that the Defendant failed to pay Davis the entirety of his Guarantee Rider; and (4) evidence that the Defendant's parent company is a German corporation are SUSTAINED.

IT IS FURTHER ORDERED that Plaintiff's motion to exclude evidence of his current position and salary at FujiFilm Medical Systems, Inc. is SUSTAINED.

This is not a final and appealable order.

This 22nd day of February, 2006.

/s/
JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

cc: Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:04CV-195-H

[Filed February 1, 2006]

JERRY W. DAVIS	)
	)
PLAINTIFF	)
	)
V.	)
	)
SIEMENS MEDICAL SOLUTIONS USA, INC.	)
	)
DEFENDANT	)
	)

MEMORANDUM OPINION AND ORDER

Plaintiff, Jerry Davis ("Davis"), has moved to revise the Court's order entered on November 8, 2005. In that order, the Court dismissed, *inter alia*, Davis's claim for the non-payment of wages under Ky. Rev. Stat. § 337.385. Plaintiff argues that the dismissal of that claim was improper. The Court dismissed the claim because Davis failed to assert his entitlement to commissions before the Labor Cabinet prior to filing his lawsuit in federal court. The Court's reasoning was

supported by two Kentucky Court of Appeals cases, *Early v. Campbell County Fiscal Court*, 690 S.W.2d 398 (Ky. Ct. App. 1985), and *Noel v. Season-Sash, Inc.*, 722 S.W.2d 901 (Ky. Ct. App. 1986). However, prior to the issuance of the Court's November 8th order, the Kentucky Supreme Court overruled both of those decisions in *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 362 (Ky. 2005).[1] In that case, the Supreme Court held that Kentucky courts have subject matter jurisdiction over a claim for non-payment of wages under section 337.385 regardless of whether the plaintiff asserts the claim before the Labor Cabinet prior to filing suit. *Id.* at 362. Therefore, Davis's failure to exhaust his remedies in front of the Labor Cabinet does not require this Court to dismiss the claim.

Nevertheless, Siemens is still entitled to summary judgment on Davis's claim for non-payment of wages on other grounds. Under section 337.385, an employee has the right to assert a private cause of action against her employer for failing to pay her the compensation to which she is entitled. Here, Davis claims that Siemens failed to pay him an override commission for every sale made during his tenure in national and government accounts. Because Kentucky imposes no statutory duty to provide an override commission, Davis must show that the override commission had been "agreed upon by [Davis and Siemens] or provided to employees as an established policy" in order to prevail. Ky. Rev. Stat. § 337.010. For the reasons explained in the Court's Memorandum Opinion issued on November 8, Davis cannot prove that Siemens agreed to pay him the

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[1] The *Parts Depot* decision was rendered on August 25, 2005 and released for publication on September 15, 2005.

commissions he seeks. Furthermore, there is no evidence that Siemens had an established policy of paying such an override commission. Instead, Siemens's express policy was to pay commissions on sales for which an employee is "directly and personally responsible." Therefore, no reasonable juror could find that Davis is entitled to the commissions under Ky. Rev. Stat. § 337.385.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff's motion to revise is DENIED and Plaintiff's claim for non-payment of wages is DISMISSED WITH PREJUDICE.

January 30, 2006 /s/ John G. Heyburn II
John H Heyburn, II
Chief Judge, U.S. District Court

cc: Counsel of Record

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:04CV-195-H

[Filed November 8, 2005]

JERRY W. DAVIS
PLAINTIFF

V.

SIEMENS MEDICAL SOLUTIONS USA, INC.
DEFENDANT

MEMORANDUM OPINION

Plaintiff, Jerry Davis ("Davis"), has brought this action for additional compensation arising from his employment relationship with Siemens Medical Solutions USA, Inc. ("Siemens"). Davis says that both the written compensation agreement and the contemporaneous oral promises entitle him to $1.8 million in additional compensation and reimbursable business expenses. He asserts state law claims for breach of contract, conversion, promissory estoppel, misrepresentation, breach of a fiduciary duty, unpaid wages and intentional infliction of emotional distress. Both sides have moved for summary judgment.

These motions raise particularly interesting questions about Kentucky's treatment of the parol evidence rule and the doctrine of promissory estoppel as applied to an oral promise made prior to the execution of a written agreement on the same subject matter. The Court concludes that under Kentucky law the evidence supports only Davis' claim of fraudulent misrepresentation.

I.

Siemens designs and sells health care information technology. Davis began working for Siemens in March, 1992. He has always been employed on an at-will basis and has held a variety of well-paying sales and non-sales jobs. In February of 2001, Davis assumed the role of Division Marketing Specialist III at an annual salary of $85,000.

In the fall of 2002 Siemens created several new positions identified as Product Sales Executives ("PSE"). These positions focused on various governmental accounts. Siemens offered Davis one of these positions and confirmed the offer by a writing dated November 11, 2002. The offer stated that Davis would receive a base compensation of $65,000 per year as well as a one year guaranteed rider in the amount of $35,000. The offer expressly incorporated a document called the "Guarantee Rider" which, in turn, incorporated the Product Sales Executive Compensation and Commission Plan (the "Compensation Plan"). The Compensation Plan set forth the eligibility for commissions for all employees, including Davis. On November 14, 2002, Davis confirmed acceptance of the offer letter, the Guarantee Rider and the Compensation Plan.

The Guarantee Rider explained the purpose of the "rider," the role of the commission payments and the application of the Compensation Plan:

> This rider is made a part of the Product Sales Executive Compensation and Commission Plan, which is to be used as the basic instrument for policy and procedure. The Guarantee Rider is made available to assure a newly appointed Product Sales Executive a guaranteed minimum level of income for a limited defined period of time. It is expected that at the end of this period, commissions for new orders generated during the period of this period will replace the requirement for guaranteed income. . . . All commissions which would be credited and/or payable during the defined period under the standard Product Sales Executive Compensation and Commission Plan will be applied toward the total guarantee payable. . . . The Product Sales Executive shall retain all excess guarantee commission payments received during the defined period or, if applicable, until the date of transfer or termination. . . . In the event the total of credited and/or payable commissions applied exceed the total guaranteed commissions payable during the defined period of the Guarantee Rider, the Product Sales Executive shall be entitled to full payment of such excess in accordance with the "when paid" provisions of the standard Compensation and Commission Plan.

The Compensation Plan sets forth the basis for entitlement to calculating commissions for all sales

executives. Thus, by its terms, its provisions would apply to the newly created PSE's. It contains the following pertinent provisions.

7. To whom commission is credited and/or payable

(a) Commission is credited or payable to a Sales Executive who is assigned to the territory in which the equipment is to be installed. It is necessary, to be entitled to commission, that the Sales Executive be personally and directly responsible, and have assigned such responsibility for such sale.

(c) National and Group Accounts, as identified in the District Office manual or other relevant announcements are Government Agencies, Companies, Associations, Chains, etc., with national buying agreements for our products, established in direct negotiation with SMS Headquarters. In most instances, commissions on orders for these accounts are paid in accordance with the procedures stated above. However, from time to time, such negotiations will provide a pricing agreement in the best interest of the Company which will necessitate a change in the basis of the compensation payment. Details of such agreements and the commission structure will be distributed by

> Headquarters to field offices as they may occur.

VII. Territory

> The territory or accounts assigned to the Sales Executive shall be clearly defined in a letter signed by the National Sales Executive. A copy of this letter must be forwarded to the responsible Senior Field Executive. Sales Executives may be transferred from one territory to another, and the territory assigned to a Sales Executive may be expanded or reduced at the discretion of the responsible National Sales Executive. Territorial changes must be defined in a letter signed by the responsible National Sales Executive and a copy must be forwarded to the responsible Senior Field Executive.

Both parties agree that the Compensation Plan comprises the entire written agreement concerning Davis's entitlement to commissions. However, Davis says that two specific verbal exchanges between himself and Siemens officials and other extrinsic evidence is relevant to his claim for additional compensation.

Two months prior to acceptance of the written agreement, Davis says that he spoke with Douglas Spotts ("Spotts"), the National Sales Manager in the Image Management ("IM") Division, about the new position. During their meeting, which took place in September of 2002 in the Breakfast Room of the Sheraton hotel in Woodbridge, New Jersey, Davis and

Spotts allegedly discussed the terms of employment, the salary and the benefits that would accompany the job. Spotts told Davis that he would be eligible to receive commissions for sales credited to national and government accounts. Because Davis knew that he would be unable to visit each and every hospital in the United States to make individual sales, he asked Spotts whether he would be forced to split commissions with the regional salesmen. Spotts allegedly promised Davis that Siemens would pay a separate, dual commission on every sale credited to national and government accounts even though he may have no direct involvement in the sales.

Sometime after he entered into his new job, Davis realized that he was not being credited with commissions for major national sales. He learned that his name had not been entered into the commission tracking system. He says that he asked Thomas Riesenberg ("Riesenberg"), the IM Division Vice President, what could be done to remedy the problem. In response, Riesenberg allegedly told him that his commissions would be calculated and paid at the end of the year out of funds reserved for payment of bonuses.

Davis says that Siemens never paid the commissions due. He now seeks to recover $1.8 million in commissions and benefits over and above his salary for the one year term of his PSE assignment.

II.

Before addressing the merits of Davis's claims, the court must first determine whether Kentucky or New Jersey law applies to the dispute. Both parties appear

to assume that Kentucky law applies. While the Court ultimately agrees, this is not a foregone conclusion.

A federal court sitting in a diversity action must apply the choice of law rules of the forum state. *See Wallace Hardware Co., Inc. v. Abrams*, 223 F.3d 382, 391 (6th Cir. 2000). Although the Compensation Plan contains a New Jersey choice of law provision, this is not necessarily determinative of the issue. *Id.* at 392 (noting that Kentucky courts do not always honor choice of law provisions). The Sixth Circuit has held that "in a standard breach-of-contract case . . . the Kentucky courts would choose to adopt § 187 of the Restatement (Second) of Conflict of Law (1971) as their analytical framework for addressing a contractual choice-of-law clause." *Id.* at 397. Section 187(2) of the Restatement provides that a choice of law provision will be enforced unless either:

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the law of § 188, would be state of the applicable law in absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Law § 187(2).

Here, New Jersey does not have a substantial relationship to the parties or the transaction between them. Siemens, a Delaware corporation, has its principal place of business in Pennsylvania. It conducts business across the country and seems to have no particular point of interest in New Jersey. Davis is a resident of Kentucky and his employment was focused there. The only facts connecting New Jersey to the instant case that the court is aware of are comparatively inconsequential. It appears that the contract was negotiated in a New Jersey hotel and that the Siemens employee who sent Davis the contract to sign worked in New Jersey. These facts alone do not establish a reasonable basis for the parties' choice of New Jersey law. In view of this analysis, the Court need not enforce the contractual choice of law provision.

In the absence of an enforceable choice of law provision, the Court will apply the "most significant relationship" test set forth in § 188 of the Restatement and adopted by Kentucky courts to determine which state's law governs. *Breeding v. Massachusetts Indem. and Life Ins. Co.*, 633 S.W.2d 717, 719 (Ky. 1982). Kentucky has the most significant relationship to this dispute. As noted, Siemens is not headquartered in New Jersey and the contract was not to be performed in New Jersey. While New Jersey may have some interest in the outcome of this litigation based on the contract's being drafted within its borders, Kentucky's interest is more significant. Davis is a long-time resident of Kentucky and his employment was centered there. For the reasons already stated, the Court will apply Kentucky law.

III.

In Count One, Davis asserts his central claim: breach of contract. He says that his employment contract entitles him to commissions on each and every sale of qualified equipment made during the term of his employment.[1] The Compensation Plan governs the contractual entitlement to commissions and states two prerequisites. First, the employee must be "assigned to the territory within which the equipment is to be installed." Second, the employee must be "personally and directly responsible . . . for such sale." The Court will assume that Davis was assigned to the sales territory in question because it appears to be undisputed that Davis's assigned territory was a national one.[2] The sole remaining contractual issue is whether Davis was "directly and personally responsible" for the relevant sales within the meaning of the Compensation Plan.

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[1] The difference between the amount Davis actually received and his demand is not a mere accounting error. Under his theory, he would be entitled to commissions and benefits of $1.8 million over and above his $65,000 base salary.

[2] The language of the Compensation Plan also provides that an employee must be "assigned . . . responsibility, for such sale." It should be noted that another section of the Compensation Plan requires that "the territory or accounts assigned to the Sales Executive shall be clearly defined in a letter signed by the National Sales Executive." The record does not reveal any signed letter defining Davis's territory. However, both parties stipulate that an employee who was personally and directly responsible for a sale in his/her territory was assigned responsibility for the sale as a matter of course.

The interpretation of a contract is a question of law for the court. *Morganfield Nat'l Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992). In the absence of an ambiguity, Kentucky courts will enforce a written instrument strictly according to its terms and will assign those terms their ordinary meaning. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003). Davis argues that the terms in the written agreement, "personally and directly responsible," are ambiguous. The Court respectfully disagrees.

A contractual term is ambiguous if it is reasonably susceptible to different or inconsistent interpretations. *Transport Ins. Co. v. Ford*, 886 S.W.2d 901, 905 (Ky. Ct. App. 1994). True, the term "personally and directly responsible" may not be a precise term of art. Nevertheless, its meaning is not reasonably susceptible to different or inconsistent interpretations. Each term is subject to clear definition. Random House defines "responsible" as "chargeable with being the author, cause, or occasion of something" and as "answerable or accountable." Random House Unabridged Dictionary (2d ed. 1993). It defines "directly" as "in a direct line, way or manner" and it defines "personally" as "through direct contact; in person; directly." Id. Moreover, as used together, those meanings reinforce one another. They require direct and unmediated involvement in the actual product sale. The Court finds that as a general matter, the term "personally and directly responsible" is absolutely clear and unambiguous.

Davis asks the court to consider additional evidence to determine what the parties meant by "personally and directly responsible." More specifically, he asks the Court to consider three factual assertions extrinsic

to the written agreement: (1) Siemens routinely paid other salesmen dual commissions; (2) his supervisor indicated that Davis would earn dual commissions in a telephone conference with a group of regional salesmen; and (3) his supervisor assured him that he would be paid commissions at the end of the year. This post-contract extrinsic evidence does not implicate the parole evidence rule. Under Kentucky law, however, the Court cannot reference extrinsic facts or aids, to determine the meaning of an unambiguous contract. *Frear*, 103 S.W.3d at 106; 11 Richard A. Lord, *Williston on Contracts* § 30:6 (4th ed.).

Even a clear and unambiguous provision can be difficult to apply in a given circumstance. That is not true here, however. Davis admits that he had no direct involvement in the actual sale of goods during his employment as the National PSE. He supervised salespeople and he put them in a position to make sales; but he did not make any sales himself. Indeed, Davis does not seem to make a serious argument that he qualifies for commissions under any generally accepted definition of the contract terms. Indeed, no conceivable definition of the terms would entitle Davis to compensation in one circumstance. As applied here, the interpretation of the Compensation Plan is not subject to serious dispute.

IV.

As an alternative means of enforcing his view of the Compensation Plan, Davis presents statements made prior to the execution of the written agreement suggesting that Siemens actually meant to pay an override commission on all national and government sales. Specifically, Davis alleges that in September of

2002, two months before he entered into the written agreement, Spotts promised him a dual commission scheme.

To succeed Davis must somehow avoid the imperatives of the parole evidence rule. *See, e.g., Luttrell v. Cooper Industries, Inc.*, 60 F. Supp. 2d 629, 631 (E.D. Ky. 1998); *M.R. Kopmeyer Co. v. Barnes*, 276 S.W.2d 21, 23-24 (Ky. 1955) (defining parol evidence as "a contemporaneous oral agreement on the same subject matter" as a governing written agreement). Generally, the parol evidence rule bars evidence of oral statements or writings made prior to or contemporaneous with a written agreement that contradict, vary or alter the language appearing in the writing. *Luttrel*, 60 F. Supp. at 631; *Johnson v. Dalton*, 318 S.W.2d 415, 417 (Ky. 1958). The rule is intended to preserve the integrity of written agreements. *O. P. Link Handle Co. v. Wright*, 429 S.W.2d 842, 847 (Ky. 1968).

Davis argues that Spotts's oral promise merely serves to clarify the agreement and that therefore the parol evidence rule does not bar its admission. To be sure, statements of the parties are admissible whenever necessary to interpret ambiguous contract language. *See, e.g., Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. Ct. App. 2002); *Reynolds Metals Co. v. Barker*, 256 S.W.2d 17, 18 (Ky. 1953). But for the exception to apply, ambiguity must be apparent on the face of the instrument itself. *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000). In other words, one cannot use parol evidence to create ambiguity in an otherwise unambiguous document. As the Court has explained above, the term "personally and directly responsible" is unambiguous on its face.

Therefore, under the parol evidence rule, the Court may not consider Spotts's alleged statement as clarification of an unambiguous term.

Alternatively, Davis argues that the Spotts's alleged oral statement meets a second exception to the parol evidence rule. Extrinsic evidence may add terms to an incomplete agreement where the written agreement constitutes only a "partial integration" of the parties' entire agreement. *Kovacs v. Freeman*, 957 S.W.2d 251, 257 (Ky. 1997); *Bullock v. Young*, 67 S.W.2d 941, 946 (Ky. 1933).[3] For extrinsic evidence to be admissible under this exception requires two showings: (1) the written agreement is only a partial integration of the parties' actual agreement; and (2) the proffered additional term is consistent with the language contained in the writing. *See Ford v. Hurt*, 265 S.W.2d 475, 477 (Ky. 1954); *Citizens Nat. Bank of Glasgow v. Damron*, 149 S.W.2d 762, 765 (Ky. App. 1941) ("[I]t is incompetent to defeat a positive unqualified writing or written promise, by proving a contemporaneous agreement in direct contradiction of the terms of the writing."). For obvious reasons, this

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[3] A writing is a "partial integration" of an agreement where the writing is incomplete and is "adopted by the parties as the expression of that portion of their larger parol agreement to which it relates." 11 Richard A. Lord, *Williston on Contracts* § 33:20 (4th ed.). To determine whether a writing is a complete or partial integration, a court must engage in a fact-specific analysis. The question is whether the parties intended for the terms recorded in the writing to be their entire agreement. 11 Richard A. Lord, *Williston on Contracts* § 33:15 (4th ed.); *Bullock v. Young*, 67 S.W.2d 941, 946 (Ky. 1933). In the present case, the Court need not determine whether the Compensation Plan is a partial integration because the Court finds the exception inapplicable on other grounds.

exception is inapplicable here. Even if Davis can show that the Compensation Plan is only a partial integration of the terms of the actual agreement, the Court may not consider Spotts's oral statement. Davis claims that Spotts assured him that he would receive commissions on any sale made in the continental United States even if he were not directly involved in its making. This alleged statement directly contradicts the Compensation Plan's language requiring direct and personal responsibility for entitlement to sales commissions.[4]

Finally, Davis cites *Texas Gas Transmission Corp. v. Kinslow*, 461 S.W.2d 69 (Ky. 1970), as the basis for yet another exception to the parol evidence rule. In *Texas Gas*, the Kentucky Supreme Court held that in the absence of a recital of consideration which the parties intend to be contractual, parol evidence is admissible to show the true consideration for the contract. *Id.* at 71; see also Ky. Rev. Stat. § 371.030

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[4] The non-existence of an actual integration clause within the Compensation Plan is not a dispositive or even a relevant factor under these circumstances. An integration clause, which typically states that there are no representations, promises or agreements between the parties except those found in the writing, is only relevant to the question of integration. *See KFC Corp. v. Darsam Corp.*, 543 F. Supp. 222, 225 (D.C. Ky. 1982). Because the Compensation Plan did not contain an integration clause, in theory it could represent only a partial integration of the actual agreement between Siemens and Davis. However, to introduce evidence of additional terms, those additional terms must be consistent with the written agreement. *Ford* 265 S.W.2d at 477. The term that Davis has proffered–that he is entitled to commissions on every sale booked in national and governmental accounts–directly contradicts the plain and unambiguous meaning of the written agreement.

("The consideration of any writing, with or without seal, may be impeached or denied by pleading."). Davis argues that the Compensation Plan was a mere recital of consideration and that the "true consideration" for his employment contract was Spotts's promise to pay him an override commission for every national and governmental sale. For the following reasons, the Court concludes that *Texas Gas* does not decide this case.

In *Texas Gas*, the consideration recorded in the writing was of a nominal nature and open to question and investigation.[5] Key matters of compensation were omitted or unknown at the time of the execution of the written agreement. Thus, our case is materially distinguishable. First, the consideration provided for in Davis's written agreement is both substantial and

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[5] The dispute in *Texas Gas* involved the plaintiffs' grant of a right of way to a gas company executed so that the company could lay a gas pipeline across the farmers' land. *Texas Gas*, 461 S.W.2d at 70. The plaintiffs and the gas company executed two written agreements, each containing a recital of nominal consideration. *Id*. One agreement contained a handwritten proviso stating that "'The above consideration dose [sic] not include any damage that might occur to a spring near the R/W.'" *Id*. Subsequent to the execution of the agreement, the gas company caused $7500 worth of damage to the farmers' spring. *Id*. The farmers sued to recover and the gas company argued that it had no contractual duty to pay the damages. *Id*. At trial, the farmers alleged that prior to the execution of the agreements, the gas company had made an oral promise to protect their spring and to pay any damages to it caused by the laying of he pipe. *Id*. Because the "Damages Release" expressly stated that the recital of consideration did not fully encompass the scope of the agreement, the court found that the recital of consideration was not contractual. *Id*. at 71. Therefore, the court held that evidence of the true consideration was admissible. Id.

determinable, rather than nominal and open to question. The agreement provides that in consideration for Davis's employment, Siemens will pay him an $65,000 base salary. a $35,000 guaranteed rider, and the payment of commissions on all sales for which he was personally and directly responsible. Even more important, unlike *Texas Gas*, neither the Compensation Plan nor any other writing indicates that the parties did not intend for the consideration recited in the Compensation Plan to be contractual and conclusive.

For all these reasons, the Court finds no basis upon which Davis might succeed on his breach of contract claim.

V.

As an alternative to his contract claim, Davis asserts promissory estoppel. Davis has two factual grounds for that claim. First, he alleges that before he entered into the written agreement, Spotts, his supervisor, orally promised to pay him an override commission on all national and international sales. Second, he alleges that after he entered into the agreement, Mr. Riesenberg, another supervisor, promised him he would receive his commissions at the end of the year. According to Davis, he detrimentally relied on each of the promises because he accepted Siemens's offer of employment and continued to work there even after Siemens failed to pay him the commissions.

After reviewing the more recent relevant Kentucky cases, the Court concludes that a claim of promissory estoppel requires proof of the following elements: (1) a

promise; (2) the promisee reasonably relies upon the promise by acting or forbearing to act upon the strength of it; (3) the promisor, at the time of making his promise, foresees or expects that the promisee would act or forbear in reliance upon it; and (4) enforcement of the promise is necessary to avoid an injustice. See Restatement (Second) of Contracts § 90(1) (1979); *Meade Const. Co., Inc. v. Mansfield Commercial Elec., Inc.*, Ky., 579 S.W.2d 105, 106 (Ky. 1979); *Lichtefeld-Massaro, Inc. v. R. J. Manteuffel Co., Inc.*, 806 S.W.2d 42, 44 (Ky. Ct. App. 1991); *Rivermont Inn, Inc. v. Bass Hotels Resorts, Inc.*, 113 S.W.3d 636, 642 (Ky. Ct. App. 2003); *Res-Care, Inc. v. Omega Healthcare Investors, Inc.*, 187 F. Supp. 2d 714, 718 (W.D. Ky. 2001); *Monumental Life Insurance Co. v. Nationwide Retirement Solutions, Inc.*, 242 F. Supp. 2d 438, 451 (W.D. Ky. 2003); *Bergman v. Baptist Healthcare System, Inc.*, 344 F. Supp. 2d 998, 1003 (W.D. Ky. 2004).

It is tempting to view promissory estoppel as merely an alternative to a standard breach of contract claim. That is certainly not the traditional view of the doctrine, however. "Historically, the doctrine of promissory estoppel traces its roots primarily to four or five principal categories of promises," all of which were gratuitous in nature: (1) promises by gratuitous bailees; (2) promises to make charitable donations; (3) promises made by one family member to another; (4) gratuitous promises for the conveyance of land; and (5) gratuitous promises regarding family settlements. 4 Richard A. Lord, *Williston on Contracts* § 8:6 (4th ed.). When the doctrine first came into being, courts universally held that promissory estoppel was not to be used as a substitute for consideration when a commercial bargain was contemplated. *See, e.g.*,

School District v. Sheidley, 40 S.W. 656 (Mo. 1897); *Heisley v. Eastman*, 201 P. 872, 879 (Or. 1921).

In one leading case, *James Baird Co v. Gimbel Brothers*, 64 F.2d 344 (2d Cir. 1933), Judge Learned Hand refused to apply the doctrine of promissory estoppel to enforce a subcontractor's bid because it was part of an arms' length commercial exchange. *Id.* at 346. In describing the doctrine of promissory estoppel, Judge Hand wrote:

> Offers are ordinarily made in exchange for a consideration, either a counter-promise or some other act which the promisor wishes to secure. . . . But a man may make a promise without expecting an equivalent; a donative promise, conditional or absolute. . . . The doctrine of "promissory estoppel" is to avoid the harsh results of allowing the promisor in such a case to repudiate, when the promisee has acted in reliance upon the promise. . . . But an offer for an exchange is not meant to become a promise until a consideration has been received, either a counter-promise or whatever else is stipulated. To extend it would be to hold the offeror regardless of the stipulated condition of his offer.

Id. (citations omitted).

Likewise, the earliest Kentucky cases recognizing the doctrine of promissory estoppel viewed the doctrine as separate and apart from contractual, commercial bargains. This Court can find only three occasions between 1911 and 1967 where Kentucky courts applied the doctrine of promissory estoppel and each occasion

involved the promise of a charitable donation unsupported by consideration. *Lake Bluff Orphanage v. Magill's Ex'rs*, 204 S.W.2d 224, 226 (Ky. 1947) (finding the doctrine of promissory estoppel applicable to a pledge by a private donor to an orphanage); *Transylvania Univ. v. Rees*, 179 S.W.2d 890, 892 (Ky. 1944) (finding insufficient detrimental reliance on the part of a private university to require the court to enforce a private donor's gratuitous pledge); *Floyd v. Christian Church Widows & Orphans Home*, 176 S.W.2d 125, 130-31 (Ky. 1943) (holding that promissory estoppel could make a charitable pledge enforceable even if it is not supported by consideration).

More recently, outside this jurisdiction, the interplay between promissory estoppel and a bargained-for exchange has blurred. Some courts have extended promissory estoppel to promises otherwise unenforceable under traditional contract doctrine. *See, e.g., Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286 (2d Cir. 1976) (suggesting the applicability of estoppel to a negotiated plea bargain alleged to be unenforceable due to its illegality). Thus, some courts have expanded the doctrine to embrace promises which were too indefinite to support a contract, *see, e.g., Doll v. Grand Union Co.*, 925 F.2d 1363 (11th Cir. 1991), and promises which are illusory. *See, e.g., First Nat. Bank of Logansport v. Logan Mfg. Co., Inc.*, 577 N.E.2d 949 (Ind. 1991). In fact, the doctrine has even been applied to enable partial enforcement of promises made when the resulting contract, if it had been entered into, would have been terminable at will. 4 *Williston on Contracts* § 8:6 (4th ed.) (citing Restatement (Second) of Contracts § 90, comment d, illustration 8).

Other courts held to the more traditional approach, concluding that the doctrine applies only when no contract exists, oral or otherwise. *See, e.g.*, *Frost Construction Co. v. Lobo, Inc.*, 951 P.2d 390, 397 (Wyo. 1998) ("Since promissory estoppel applies only if a contract does not exist, a promissory estoppel argument in this case, where the evidence demonstrates the existence of a contract, is incongruous."); *Walker v. KFC Crop.*, 728 F.2d 1215, 1220 (9th Cir. 1984); *Spensley Feeds, Inc. v. Livingston Feed & Lumber, Inc.*, 381 N.W.2d 601, 607 n. 8 (Wis. 1985); *Tuomala v. Regent University*, 477 S.E.2d 501, 506 (Va. 1996).

Kentucky's state courts have given little guidance about the current scope of promissory estoppel. *See* Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 Willamette L. Rev. 263, 384 (1996) ("There is a paucity of Kentucky promissory estoppel cases."). One consequence of this relative inattention is that Kentucky courts have never ruled that the doctrine applies *exclusively* to gratuitous promises or that promissory estoppel is inapplicable to contractual arrangements. More important, however, our courts have not suggested an intent to extend the scope of promissory estoppel. Kentucky courts have consistently held that promissory estoppel applies to gratuitous promises, unsupported by consideration. *See e.g.*, *McCarthy v. Louisville Cartage Co., Inc.*, 796 S.W.2d 10, 12 (Ky. App. 1990) ("The whole theory of a promissory estoppel action is that detrimental reliance becomes a substitute for consideration under the facts

of a given case.")[6]; *Lichtefeld-Massaro, Inc.*, 806 S.W.2d at 43-44 (holding that promissory estoppel made a subcontractor's bid an enforceable promise even though the general contractor was not mutually bound to accept the bid at the time it was made). They have also suggested that promissory estoppel is fundamentally different from a contract. *See McCarthy*, 796 S.W.2d at 12 (promissory estoppel "is not founded upon a legal duty and a breach thereof; but rather, it is based upon a mere promise and reliance on that promise").

In sum, Kentucky courts seem to have so far narrowly confined their use of the doctrine and, in doing so, have suggested that promissory estoppel is fundamentally different from a contract. With this in mind, the Court will consider each of Davis's claims in turn.

A.

The Court first addresses Davis's claim that he detrimentally relied on Spotts's alleged oral promise to pay him override commissions. As discussed above, the parol evidence rule would bar the use of the Spotts's statement to establish breach of contract. At issue here then is whether a party may assert a promissory

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[6] It should be noted that the *McCarthy* opinion appears to have conflated the elements of promissory estoppel and equitable estoppel. Nevertheless, *McCarthy* was certainly a promissory estoppel case. Indeed, the Kentucky Supreme Court and various federal courts have cited *McCarthy* as part of its adherence to the doctrine of promissory estoppel. *See, e.g., United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 470 (Ky. 1999); *FS Invs., Inc. v. Asset Guar. Ins. Co.*, 196 F. Supp. 2d 491, 506-507 (E.D. Ky. 2002).

estoppel claim based on an oral promise that is otherwise barred by the parol evidence rule. No Kentucky state court has directly addressed this issue.[7] Accordingly, this Court must "ascertain from all available data . . . what the state's highest court would decide if faced with the issue." *Grantham and Mann, Inc. v. American Safety Products, Inc.*, 831 F.2d 596, 608 (6th Cir. 1987). To do so, the Court will examine decisions and rationales from other jurisdictions that have decided this specific issue, general Kentucky law, and policy considerations for guidance in determining how the Kentucky Supreme Court would likely decide this issue.

The majority of courts in other jurisdictions has held that a prior inconsistent oral promise cannot be the basis of a promissory estoppel claim. *Durkee v. Goodyear Tire & Rubber Co.*, 676 F. Supp. 189, 192 (W.D. Wis. 1987) ("To entertain a theory of recovery that makes a prior, inconsistent promise enforceable is to write the [parol evidence] rule out of existence."); *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862,

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[7] For this Court's purposes, the issue at hand is of first impression for Kentucky state courts. Siemens cites *Tractor and Farm Supply, Inc. v. Ford New Holland, Inc.*, 898 F. Supp. 1998 (W.D. Ky. 1995) as support for the proposition that Davis's promissory estoppel claim is precluded by Kentucky law. In *Tractor Farm*, this Court held that under Kentucky law, "estoppel cannot be the basis for a claim if it represents the same performance contemplated under a written contract." *Id.* at 1205. While the foregoing analysis eventually reaches the conclusion that Kentucky courts would so hold, no Kentucky court has in fact specifically decided the issue. In *Tractor Farm*, this Court relied on *General Aviation, Inc. v. Cessna Aircraft Co.*, 915 F.3d 1038, 1042 (6th Cir. 1984), a Sixth Circuit decision. However, in that case the Sixth Circuit applied Michigan law.

869-70 (7th Cir. 1999); *Davis v. University of Montevallo*, 638 So.2d 754, 758 (Ala. 1994); *Big G Corp. v. Henry*, 536 A.2d 559, 562 (Vt. 1987); *Johnson v. Curran*, 633 P.2d 994, 996-97 (Alaska 1981); *Prentice v. UDC Advisory Services, Inc.*, 648 N.E.2d 146, 152-53 (Ill. App. 1995).

The Seventh Circuit case, *All-Tech Telecom*, provides a well-reasoned explanation of the majority rule. There, Judge Richard Posner found the doctrine of promissory estoppel inapplicable to a series of oral promises made during the course of negotiations and during the course of the performance of a written agreement. *All-Tech Telecom*, 174 F.3d at 869-70.[8] The Seventh Circuit affirmed the dismissal of the promissory estoppel claim holding that a "promisee cannot be permitted to use the doctrine to do an end run . . . around the parol evidence rule." *Id.* at 869. Judge Posner reasoned that where a written contract governs the relationship between the parties, promissory estoppel is a duplicative remedy:

> Promissory estoppel is meant for cases in which a promise, not being supported by

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[8] In *All-Tech Telecom*, the defendant, Amway, offered to its distributors a credit-card operated telephone system called TeleCharge for sale to restaurants and hotels. *Id.* at 864. All-Tech, an Amway distributor, entered into a written agreement with Amway to purchase a large number of the phones. *Id.* All-Tech claimed to have been lured into the unsuccessful venture by a series of oral misrepresentations, including a promise that Amway had conducted extensive research regarding the success of the telephones. None of the warranties was included in the written terms of the agreement. *Id.* All-Tech filed, *inter alia*, a promissory estoppel claim based on these alleged oral misrepresentations. *Id.*

> consideration, would be unenforceable under conventional principles of contract law. When there is an express contract governing the relationship out of which the promise emerged, and no issue of consideration, there is no gap in the remedial system for promissory estoppel to fill. To allow it to be invoked becomes in those circumstances gratuitous duplication or, worse, circumvention of carefully designed rules of contract law. *Id.* (citations omitted).

Because the parties' contract covered the relationship within the scope of the alleged warranty, the court found no reason "for using the doctrine of promissory estoppel to resuscitate it." *Id.*

Thus, the general rationale for the majority rule is that the written agreements supercede and incorporate all prior oral statements on subjects covered by the written agreement. The Seventh Circuit's interpretation of promissory estoppel is consistent with the more limited scope of the doctrine apparent from a full review of Kentucky cases. To hold otherwise, makes the formalities of a written contract meaningless.

The Kentucky courts have also been reluctant to contravene the technical requirements of contract law. In *Rivermont Inn, Inc.*, Kentucky's most recent and most thorough explanation of the doctrine of promissory estoppel, the Court of Appeals held that promissory estoppel could not be applied to defeat the statute of frauds under the particular circumstances involved. *Rivermont Inn, Inc.*, 113 S.W.3d at 643. *Rivermont* is a different case from ours in many

respects.[9] Its significance, however, is that the Kentucky Court of Appeals was not inclined to allow the doctrine of promissory estoppel as means of avoiding rules of contract interpretation and compliance. *See id.* at 642 (noting that detrimental reliance on an oral promise is "not sufficient to defeat the statute of frauds").[10]

The overarching principle suggested in *Rivermont Inn, Inc.* applies just as clearly to the common law parole evidence rule as it does to the statute of frauds. Kentucky views the parol evidence rule as a firm and well-established rule of law. The rule dates back to at least the mid-19th-century. *See, e.g., Park v. Price*, 1 Ky. Op. 17 (1866) ("It is a well-settled principle that parol evidence is not admissible to vary the terms or import of a writing . . . ."). Since then it has been interpreted as "more than a rule of evidence . . . . It is one of substantive law." *Gibson v. Sellars* 252 S.W.2d

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[9] In *Rivermont*, a hotel and resort company claimed that a representative of the Holiday Inn Franchise Administration orally promised to approve its application for a license to open a local franchise. *Id.* at 639. The court noted that if the alleged conversation constituted an oral contract, it would be unenforceable under the statute of frauds because the franchise relationship was to last five years. *Id.* at 642. In the instant case, the statute of frauds provides no bar to the enforceability of Spotts's alleged oral promise.

[10] The Court of Appeals did not hold that promissory estoppel could never be used to defeat a statute of frauds defense. Instead, after noting initially that detrimental reliance on an oral promise is "not sufficient to defeat the statute of frauds," the court held that the plaintiff had failed to prove that its detrimental reliance was reasonable because the written agreement expressly provided that oral promises would not be binding. *Id.* at 642.

911, 913 (Ky. 1952). To allow oral promises otherwise inadmissible under the parol evidence rule to form the basis of a promissory estoppel claim would eviscerate the rule and disregard at least 140 years of jurisprudence.

Accordingly this Court finds that an oral promise made prior to the execution of a written agreement that is inconsistent with the unambiguous terms of the written agreement cannot form the basis of a promissory estoppel claim. As applied to the instant case, Davis is precluded from asserting promissory estoppel as a grounds for relief.

B.

Next Davis argues that he is entitled to relief under promissory estoppel because a few months after he signed the Compensation Plan, his supervisor, Mr. Riesenberg, assured him that he would receive his commissions at the end of the year. Davis alleges that after he took the National and Governmental Sales position, he complained to Riesenberg that the computer program used to calculate commissions was not formulated to pay him his override commission. Riesenberg allegedly reassured Davis that his commissions would be calculated and paid at the end of the year out of a stipend fund. Davis argues that Riesenberg's reassurance constituted a promise and that he detrimentally relied on it by continuing to work for Siemens.

Here, the alleged promise was made after the execution of the written agreement. Davis's reliance on it, therefore, would not circumvent the parol evidence rule. Thus, notwithstanding the Court's analysis

above, his allegation could constitute a viable claim of promissory estoppel provided that he properly asserted the *prima facie* elements. However, the Court finds that Davis cannot make a *prima facie* case.

Taken alone, Riesenberg's offhand, ministerial statement is not a promise. See Restatement (Second) of Contracts § 2 (defining a promise as a "manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made"). To be sure, the fact that Riesenberg reassured Davis that he would be paid at the end of the year could be construed as a reaffirmation of Spotts's original promise to pay him override commissions. Indeed, the statement arguably corroborates the fact that the original promise was made. However, it is not an independent enforceable promise on its own. Therefore, no reasonable juror could find that Davis is entitled to recover on the basis of promissory estoppel.

VI.

Davis also asserts a claim for misrepresentation based on the statements of Douglas Spotts in September of 2002 during a meeting at the Sheraton Hotel in Woodbridge, New Jersey. To state such a claim, Davis must allege: (1) that Siemens made a false statement; (2) regarding a material fact; (3) that Siemens knew the statement to be false or acted recklessly as to its truth or falsity; (4) that Siemens intended to deceive Davis; (5) that Davis reasonably relied upon the deception; and (6) that Davis suffered damages as a result. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999); *Res-Care, Inc.*

v. Omega Healthcare Investors, Inc., 187 F. Supp. 2d 714, 717 (W.D. Ky. 2001); *Hunt Enterprises, Inc. v. John Deere Indus. Equipment Co.*, 18 F. Supp. 2d 697, 702 (W.D. Ky. 1997).

As previously discussed, during that meeting, Spotts told Davis that in he would receive an override commission on all national and governmental sales regardless of his personal involvement in the actual sales. Davis argues that this alleged promise was a material misrepresentation of fact that Spotts knew to be false. Davis further alleges that he relied on the statement, as Spotts intended, when he accepted the offer of employment. A misrepresentation claim is considerably more difficult to prove than promissory estoppel because it requires evidence of knowing deception or fraud. Nevertheless, Davis appears to meet the bare minimum for a *prima facie* case of misrepresentation.

Under Kentucky law, representations as to future conduct will not support a fraud claim. *See, e.g.*, *Res-Care, Inc. v. Omega Healthcare Investors, Inc.*, 187 F. Supp. 2d 714, 717 (W.D. Ky. 2001); *Schroerlucke v. Hall*, 249 S.W.2d 130, 131 (Ky.1952); *Moseley v. Owensboro Municipal Housing Commission*, 252 S.W.2d 880, 881 (Ky.1952). However, a statement as to future conduct may form the basis for a misrepresentation claim if made with the intent to induce the other party to enter into a contract. *See Evola Realty Co. v. Westerfield*, 251 S.W.2d 298, 300-01 (Ky.1952); *Schroerlucke*, 249 S.W.2d at 131. That appears to be an inference available from our facts. Davis has alleged that Siemens promised to pay him commissions with the knowledge that it would never pay him so as to induce Davis into accepting the offer

of employment. This allegation is sufficient to state a claim for fraud against Siemens.[11]

Siemens also argues that the economic loss doctrine bars Davis's misrepresentation claim. Citing *Ohio Casualty Ins. Co. v. Vermeer Mfg. Co.*, 298 F. Supp. 2d 575 (W.D. Ky. 2004), Siemens argues that because Davis's misrepresentation claim is inseparable from his contractual claims, Davis's exclusive remedy is breach of contract. There is some support for this proposition. *See, e.g., R.A.M. Sourcing Agency, Inc. v. Seaboard Marine, Ltd.*, 995 F. Supp. 1465, 1467 (S.D. Fla.1997) (a party may not raise tort claims to recover solely economic losses arising from a breach of contract unless there is evidence of physical injury or damage to other property); *Heller Fin., Inc. v. Grammco Computer Sales, Inc.*, 71 F.3d 518, 527-28 (5th Cir. 1996) (tort damages are not recoverable for a fraudulent inducement claim unless the plaintiff suffers an injury that is distinct, separate, and independent from the economic losses recoverable under a breach of contract claim).

However, to date, no Kentucky court has held that the economic loss rule applies so expansively. Instead the economic loss rule has been limited to apply to products liability cases, *see, e.g., Ohio Casualty Ins. Co.*, 298 F. Supp. 2d at 577-78, to business purchases, *see, e.g., Mt. Lebanon Personal Care Home Inc. v. Hoover Universal Inc.*, 276 F.3d 845, 849 (6th Cir.

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[11] It should be noted that Davis has moved for summary judgment on his misrepresentation claim as well. However, because Siemens alleges that Spotts never made the alleged statement regarding Davis's entitlement to commissions; there is a genuine issue of material fact. Therefore, summary judgment is inappropriate.

2002), and to construction cases, *see, e.g.*, *Bowling Green Municipal Utilities v. Thomasson Lumber Co.*, 902 F. Supp. 134 (W.D. Ky. 1995). To expand the rule so as to bar a fraudulent inducement claim in an employment contract without further guidance from the Kentucky courts would eviscerate the claim of fraudulent inducement and would contravene contrary Kentucky case law. *See, e.g.*, *Hanson v. American Nat'l Bank & Trust Co.*, 865 S.W.2d 302, 309 (Ky. 1993) ("The idea that any person or industry or enterprise would be immune from liability for fraud and deceit is not acceptable.").

Therefore, a reasonable juror could find that Davis is entitled to recover based on his misrepresentation claim.

VII.

Davis also asserts claims for conversion, misrepresentation, breach of fiduciary duty and for violation of Kentucky's wage statute. The claims are more easily resolved as follows.

A.

Siemens argues that Davis's conversion claim cannot succeed because he had no ownership rights in any particular property. Davis says that he may pursue the conversion claim at the same time as his contract claim irrespective of the similarity of the remedies.

The elements of a conversion claim are (1) ownership rights in a certain property, (2) the wrongful act of taking or disposing of property, and (3)

causing damages. *Anderson v. Pine South Capital, LCC*, 177 F. Supp. 2d 591, 603 (W.D. Ky. 2001); *Goss v. Bisset*, 411 S.W.2d 50, 53 (Ky. 1967). A conversion claim and contract claims are not always incompatible. Here, however, the conversion claim does not lie because the property right alleged to have been converted arises entirely from the contractual rights to compensation. In reality, Davis seeks payment of a disputed debt, not payment for the conversion of a specific asset or a specific property right. The interpretation of the contract governs Davis's entitlement to the disputed payments.

B.

Siemens argues that Davis's claim for breach of fiduciary duty simply does not apply in these circumstances. A fiduciary relationship is one "founded on trust or confidence reposed by one person in the integrity and fidelity of another," and that relationship must involve "an undertaking in which a duty is created in one person to act *primarily for another's benefit*." *Monumental Life Ins. Co. v. Nationwide Retirement Solutions, Inc.*, *supra* (emphasis added) (*quoting Steelvest Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 485 (Ky. 1991); *Auto Channel, Inc. v. Speedvision Network, LLC*, 144 F. Supp. 2d 784, 793 (W.D. Ky. 2001). Davis has offered no evidence that Siemens had a duty to act primarily for Davis's benefit no is there evidence that Siemens and Davis were involved in a "joint venture." *See Greenup v. Hewitt*, 235 S.W.2d 1000, 1002 (Ky. 1951). Davis was a salaried employee who under certain circumstances was entitled to receive commissions. This does not constitute a joint venture. Under the evidence here, the Court concludes that Siemens did not assume

fiduciary duties with respect to its employment relationship.

C.

Siemens argues that Davis's wage claim under KRS 337.385 fails because the claim is one not covered by the statute and in any event, Davis did not pursue his necessary administrative remedies before initiating his lawsuit. The Court agrees.

Davis has not satisfied his administrative prerequisites. Section 337 bars proceeding to a civil lawsuit until the Labor Commissioner has conducted his own proceeding. *McMichael v. Falls City Towing Co.*, 199 F. Supp. 2d 632, 637 (W.D. Ky. 2002). Thus, claims brought pursuant to KRS 337.385 must first be raised before the Labor Cabinet to resolve questions of fact. Davis has failed to comply with this requirement and, therefore, cannot avail himself of the benefits of KRS 337.385.

VIII.

Siemens argues that Davis's potential infliction of emotional distress claim must be dismissed because its conduct was not outrageous and did not cause severe emotional distress to Davis. To make such a claim, one must prove the following elements: (1) conduct that is intentional and reckless; (2) conduct that is so outrageous and intolerable that it offends generally accepted standards of decency and morality; (3) a causal connection between the alleged wrongful conduct and the emotional distress; and (4) severe emotional distress. *Gilbert v. Barkes*, Ky., 987 S.W.2d

772, 777 (1999); *Pennington v. Dollar Tree Stores, Inc.*, 104 F. Supp.2d 710, 715 (E.D. Ky. 2000).

Davis's claim is based almost entirely upon Mr. Riesenberg's actions and statements. He says that Riesenberg verbally abused him with foul language; that he filled out unfavorable appraisal sheets; that he blocked his right to health care; all for the purpose of driving Davis from the company. Although such conduct may be offensive, it is not so outrageous and intolerable that it offends generally accepted standards of decency and morality. Therefore, summary judgment is appropriate.

The Court will enter an order consistent with this Memorandum Opinion.

November 8, 2005

/s/ John G. Heyburn II
John G. Heyburn II
Chief Judge, U.S. District Court

cc: Counsel of Record

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-5420

[Filed August 27, 2008]

JERRY W. DAVIS, Plaintiff-Appellant,	)
v.	)
SIEMENS MEDICAL SOLUTIONS USA, INC., Defendant-Appellee.	)

ORDER

BEFORE: KEITH, DAUGHTREY, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green
Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CASE NO. 3:04CV-195

[Filed January 6, 2006]

JERRY W. DAVIS	)
	)
PLAINTIFF	)
	)
V.	)
	)
SIEMENS MEDICAL SOLUTIONS USA, INC.	)
	)
DEFENDANT	)
	)

MOTION TO REVISE THIS COURT'S ORDER ENTERED ON NOVEMBER 8, 2005

COMES NOW, the Plaintiff, Jerry W. Davis, and respectfully moves the Court, pursuant to Fed. R. Civ. Proc. 54(b), to partially revise its Order entered on November 8, 2005. That order and memorandum opinion, inter alia, granted summary judgment to the Defendant on the Plaintiff's wage claim under KRS 337, based upon Kentucky law that was overruled by the Kentucky Supreme Court, in *Parts Depot, Inc. v.*

Beiswenger and Housing Authority of Middlesborough, 170 S.W.3d 354 (Ky. 2005), immediately after the conclusion of briefing by the parties on their motions for summary judgment.

The Kentucky Supreme Court, reversing precedent to the contrary, has held in *Parts Depot* that an employee is not required to exhaust administrative remedies before bringing a claim under KRS 337. The Kentucky Supreme Court decided that plaintiffs may have immediate recourse to the civil courts, which have been accorded original jurisdiction over KRS 337 claims.

The Court's entry of summary judgment on Mr. Davis' claim for wages under KRS 337 should, therefore, in light of this new decision by Kentucky's highest court, be revised to deny the Defendant summary judgment, based on the current, controlling Kentucky law relevant to this claim. The Plaintiff submits in support hereof the attached proposed Order and his Memorandum of Law in Support of Plaintiff's Motion to Revise this Court's Order Entered on November 8, 2005.

Respectfully submitted,

/s/Robert W. Bishop
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

No. 3:04CV-195

[Filed January 6, 2006]

JERRY W. DAVIS	)
	)
PLAINTIFF	)
	)
V.	)
	)
SIEMENS MEDICAL SOLUTIONS USA, INC.	)
	)
DEFENDANT	)
	)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO REVISE THIS COURT'S ORDER ENTERED ON NOVEMBER 8, 2005

I. Introduction

Plaintiff, Jerry Wade Davis, through the undersigned counsel, respectfully submits this memorandum of law in support of his motion to revise the Court's Order partially granting the Defendant's Motion for Summary Judgment, entered on November 8, 2005. Pursuant to FRCP 54(b), the Plaintiff has moved that the Court revise its said Order as to the Plaintiff's claim under KRS 337.385, in light of the most recent Kentucky Supreme Court decision

relevant to this claim. That decision was not rendered until August 25, 2005, one day after the conclusion of briefing by the parties on their motions for summary judgment, and was not released for publication until September 15, 2005, one day prior to the hearing date set by the Court for oral argument on the summary judgment motions, and was apparently, therefore, overlooked by the parties.

II. Plaintiff is not required to exhaust his administrative remedies under KRS 337

When granting the Defendant's motion for Summary Judgment on the issue of the Plaintiff's claim under KRS 337.385, this Court held, on page 25 of its Memorandum, that the Plaintiff's claim failed because:

> Davis has not satisfied his administrative prerequisites. Section 337 bars proceeding to a civil lawsuit until the Labor Commissioner has conducted his own proceeding. *Michael v. Falls City Towing Co*, 199 F. Supp.2d 632, 637 (W.D. Ky. 2002). Thus claims brought pursuant to KRS 337.385 must first be raised before the Labor Cabinet to resolve questions of fact. Davis has failed to comply with this requirement, and, therefore, cannot avail himself of the benefits of KRS 337.385.

The Kentucky Supreme Court has now dealt with the specific issue of whether a claim must first be brought before the Labor Cabinet in *Parts Depot, Inc. v. Beiswenger and Housing Authority of Middlesborough*, 170 S.W.3d 354 (Ky. 2005). (A copy has been attached, for the Court's convenience, as

Exhibit A hereto.) The Kentucky Supreme Court ruled on the issue of whether the Labor Cabinet had exclusive jurisdiction over all claims arising under KRS 337.385, or whether the state courts could have original jurisdiction over these claims, in addition to appellate jurisdiction over claims which were heard by the Labor Cabinet.

The employer in the *Parts Depot* case argued that KRS Chapter 13B "vests exclusive jurisdiction of all wage-and-hour disputes in the Department of Labor, requiring [employees] to exhaust administrative remedies and limiting circuit court jurisdiction to appellate review." *Id.* at 359. The Kentucky Supreme Court specifically rejected this argument. It held that a case may be brought under this statute in civil court, and that the courts have original subject matter jurisdiction over these types of claims.

The Supreme Court ruled that "nothing ... in KRS Chapter 13B can be construed as conferring upon the Department of Labor exclusive jurisdiction to resolve all disputes pertaining to nonpayment of salary or wages." *Id.* at 362.

II. Conclusion

Due to the timing of the rendering and publication of the *Parts Depot* opinion, as described above, this Court was not provided with the benefit of this precedent when making its analysis of this claim. As the Court's stated reason for granting summary judgment on the Plaintiff's KRS 337.385 claim was the issue of Plaintiff's failure to exhaust administrative remedies, and as the Kentucky Supreme Court has now held that such exhaustion of administrative

remedies is not necessary in order to pursue a claim under that statute in civil court, Plaintiff respectfully submits that the Court should revise its Order entered on November 8, 2005 to allow Plaintiff's claim under KRS 337.385 to proceed to the jury trial in this matter on February 21, 2006.

Respectfully submitted,

/s/Robert W. Bishop
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APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Case No. 3:04CV-195

[Electronically Filed March 13, 2006]

JERRY W. DAVIS,	)
	)
Plaintiff,	)
	)
v.	)
	)
SIEMENS MEDICAL SOLUTIONS USA, INC.,	)
	)
Defendant.	)

DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR FOR A NEW TRIAL

The Defendant, Siemens Medical Solutions, USA ("Siemens" or "the Company"), by counsel and pursuant to Rule 50 and Rule 59(a) of the Federal Rules of Civil Procedure, submits this Renewed Motion For Judgment As A Matter Of Law Or, Alternatively, For A New Trial. Siemens has also submitted a Memorandum of Law in Support for this motion

contemporaneously with this filing. As detailed more fully in that Memorandum, Siemens asserts the following primary arguments in support of its motion:

1. Siemens is entitled to judgment as a matter of law because no reasonable jury could find by clear and convincing evidence that Siemens fraudulently misrepresented Plaintiff's commission eligibility to him; and

2. In the alternative, Siemens is entitled to a new trial because of statements in Plaintiff's opening statement and closing argument and the improper admission of evidence regarding alleged mistreatment of Plaintiff by Tom Riesenberg were erroneous, prejudicial and impermissibly tainted the jury's verdict.

As a result of the foregoing, Siemens moves this Court to vacate the jury's verdict in this action and enter judgment as a matter of law in its favor. In the alternative, Defendant moves this Court to vacate the jury's verdict and grant a new trial.

Respectfully submitted,

SIEMENS MEDICAL SOLUTIONS

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APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 3:04-CV-195-H

[Dated February 22, 2006]

JERRY DAVIS)
PLAINTIFF,)
)
-VS-)
)
SIEMENS MEDICAL SOLUTIONS)
DEFENDANT.)

TRANSCRIPT OF JURY TRIAL
VOLUME IB
BEFORE MAGISTRATE JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

DERBY REPORTING SERVICES
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* * *

[p.11]

Q. Do you know how many sales --

A. Let me just finish. And then that territory split in about -- with the growth of the product in the industry into a split in about 2001 where I only covered Texas, Oklahoma, New Mexico, and still parts of Louisiana.

Q. Okay. Do you know how many sales territories Siemens has for its product sales executives for regional based?

A. Yes. Again, we were up at about six until 2000, 2001 time frame. It went to thirteen, splitting that piece. So the growth from '97 until when I left in 2004, was anywhere from about a half dozen of us to thirteen of us, fourteen of us.

Q. So by 2001 or thereabouts it was up to thirteen territories?

A. Yeah. I mean, it was growing at that rate, I mean, so I wouldn't say -- I don't know exactly when they populated every role, but I would say that's about right.

Q. Okay. In your sales position as a product sales executive for Siemens, what was the highest commission that you made as a regional PSE?

A. On my W-2 or actually what --

Q. Just tell us what you made.

A. Okay. Well, I mean, the highest year, 250.

* * *

[p.15]

Q. In one year.

A. That would be Christie Whelen and it was in the $4- to $500,000.

Q. Have you had the opportunity to see sales people in this PACS field receive large commissions in addition to what you just testified to?

A. I mean, yeah. I mean, I've -- between leaving Siemens and working and going into another company, McKesson, executives I've seen solution sales that people made commissions equivalent to a million bucks.

THE COURT: I'm sorry, were you talking about Siemens or another company?

THE WITNESS: Another company.

THE COURT: All right.

BY MR. BISHOP:

Q. Did you attend the weekly sales conferences that were held by telephone with Doug Spotts when he was the national sales manager for Siemens' IM division?

A. Yes.

Q. How did you do that? How did you attend?

A. Via phone.

Q. Did you just call in?

A. Yeah, just call-in number.

Q. Are you aware of any professional connection between Mr. Spotts and the IM Divisional Vice President,

[p.16]

Tom Riesenberg?

A. Yes.

Q. What is that?

A. They were friends at SMS and that's how Doug got the job or Doug was pulled over by Tom Riesenberg to take the job after Bill Kelly, so.

Q. What types of things go back to the weekly sales telephone conferences with Doug Spotts, what types of things were discussed during those weekly telephone calls?

A. They were updates, they were policies. I mean, you know, if there was a particular project that we were working on, just a quick round table on those projects for Doug's edification because he has to report up. Anything that's going on as far as, you know, marketing efforts, any new things that we needed to be doing, any roles, you know, responsibilities, product updates, pricing changes, things of that nature.

Q. Was the scope of Mr. Wade Davis's new role ever discussed during one of these conference calls?

A. Yes.

Q. And what was that new role?

A. Basically the role was that we needed support at the national accounts layer for PACS and that Mr. Davis would be involved with that layer to help

[p.17]

facilitate the business and grow the business.

Q. And national accounts, what does that cover?

A. National accounts basically covers group purchasing organizations, large entities, Tenants, Triads, organizational, large organizations that are health care based.

And so the way Siemens is set up is that they correlate what they call executives and assign those to the upper layer of those organizations, so they call on those layers. They use specialists to help them with those sales.

In this case Mr. Davis was going to be assigned to that team, particularly Frank Biddlestone. He was doing a lot of work with the Government, DOD, DIN PACS II was coming up. There were other GPOs that were going on. And so you had an account executive base that were calling on Novation and Tenants and Triads that were offering other Siemens' products, but they were intimidated talking about PACS. And it was very difficult for us in the local level to motivate them to talk about it.

Q. And you have testified here that the territory that you covered, described for shorthand purposes, as a southwestern territory. Did you understand Mr. Davis's territory -- what did you understand the scope of

[p.18]

Mr. Davis's territory to be?

A. The national accounts. So anywhere national accounts went, which would cover the United States.

Q. Do you recall if during this telephone conference where Mr. Spotts had announced Mr. Davis's new role, do you recall if Mr. Davis's entitlement to earn commissions was discussed?

A. It was basically -- when it was announced that he would be in a sales role, you know, the first question out of any sales guy's mouth is how is that going to impact my commission? So, is that going to be -- is that going to impact my commission? And the comment back was, it would not impact the local PSE's commission.

Q. Mr. Spotts told you that it would not impact -- Wade Davis's commission would not impact --

A. That was communicated in the call. You have twelve sales people on the call, every one of them wanting to know point number one, is it ever going to impede my dollar?

Q. Okay. Was it your understanding that Mr. Davis would be able to earn commissions of -- as a result of this phone conference, that he would be able to earn commissions as a PSE for national accounts?

A. Yes.

Q. Was it uncommon for Siemens to pay double

[p.19]

commissions to its sales people in the IM division?

A. Define double commissions. I mean, if a transaction went down the way Siemens organized was, if the AE and the PSE would be paid on a deal, so they would pay a sales guy and they would pay what would be the product guy. So that's the structure of Siemens. So, if you're saying two individuals getting paid for the same transaction, the answer is, yes.

Q. And they were being paid on the same sales dollars?

A. Same sales dollars.

Q. What would you call that, a dual commission?

A. I mean, I don't know if it's called dual commission or not. The reality is, if a transaction went down, both people received an amount of money for that transaction. Their scale is different from our scale.

Q. If, for example, a sale was made to a particular hospital, would both the account executive and the regional PSE assigned to that hospital and that regional PSE's territory receive a commission?

A. Yes.

Q. And it would not be a split commission where the PSE was taking part of the account executive's commission, would it?

A. No, it would be according to your comp plan.

* * *

[p.35]

Q. And he never volunteered any specifics to you, did he?

A. No

Q. How many years did you work for Siemens?

A. Fifteen.

Q. I think you testified the most you ever heard a PSE making was somewhere around the $4- to $500,000 range?

A. In one year, yeah.

Q. So you've never heard of a PSE making $1.77 million in one year?

A. The answer is not to my knowledge.

Q. Okay.

A. Not at Siemens.

Q. This conference call you mentioned with Mr. Spotts on the phone --

A. Uh-huh.

Q. -- you remember Mr. Spotts saying it wouldn't impact your compensation, right?

A. That's correct. That was the message of the call.

Q. And that was pretty much all you recall about that issue, right?

A. That's my concern.

Q. And that's what you remember about it because

* * *

[p.54]

A. That's correct.

Q. To your knowledge, did all of the sales positions at Siemens provide the opportunity to -- let's just say Siemens IM divisions, since that's what we're talking about. Did all of the sales positions at Siemens IM provide the opportunity to earn commissions?

A. That's correct. They wouldn't have been classified as sales jobs at that point, they would have been more of a support role.

Q. Was there ever a maximum amount of sales commissions that sales people were eligible to earn in the IM division?

A. No. In fact, the year that I did so well, we had set a record of around $15 million that came out of my region. The next year one of my counterparts, a lady by the name of Christie Whelen, sold $24 million. I think she made close to a half a million dollars that year. And, again, in order to continue to maintain a good living with the company and to have these years where you're just completely blowing it out, making more

money than you could ever imagine could be real, you get paid the front end commission when the order gets booked and then the back end commission is paid when the customer pays their bill.

So, I mean, essentially in that year where I

[p.55]

did $300,000, I had had a $200-plus thousand year the year before, and I had a lot of back-end commission that was coming in along with the front ends of what was sold that year. So even in my last year with Siemens, which was one of the worst that I'd had since I first started, I made $200,000.

But to go along with that when you start looking at what some of the numbers that Christie had done, she was in a very good territory, had done really well, and I think she's had a couple years running where she made over half a million dollars running because of back-end and front-end commissions that would run together. And, again, this is when the territories that shrunk in a three-state area.

Q. Do you recall the period of time for which Doug Spotts was the national sales manager for the IM division?

A. Absolutely.

Q. And do you recall when that was?

A. Date-wise, I would say shortly after Tom Riesenberg came on as the division manager. There was an individual who was in the role of the sales

manager position, a gentleman by the name of Bill Kelly, that Tom didn't particularly like too well. Tom was on board, you know, less than six months when he brought Doug in to

* * *

[p.57]

you know, the abuser --

MR. BISHOP: I didn't anticipate him to answer that.

THE COURT: Okay.

(The bench conference was then concluded.)

THE COURT: All right. Ladies and gentlemen of the jury, I told you at the beginning we would occasionally have conferences up here. That's what's called the sidebar. They come over to the side of the bench and we discuss an evidentiary point. Please continue, Mr. Bishop.

MR. BISHOP: Thank you, Your Honor.

BY MR. BISHOP:

Q. At these weekly -- let me back up and ask you about the weekly telephone sales conferences that were held during Mr. Spotts' tenure as the national sales manager for the IM division. What sort of things were discussed in those telephone conferences?

A. Basically what was the order of the day, oftentimes we talked about competitive stuff, as I alluded to earlier. Any new developments, any new

products that were coming out. Really, it was the medium of communication of headquarters and Doug being able to, you know, talk to his sales people, get everybody in a forum where we could have active discussion about what's

[p.58]

going on in our lives. We might talk about a specific deal where there's compensation involved. We may talk about a new product that was being introduced. There was not a whole lot of structure to it, other than it was whatever Doug wanted to talk about is what we were on the call for.

Q. Do you remember a sales telephone conference when Doug Spotts was the national sales manager in which he informed the product sales executives about Wade Davis assuming a new position?

A. I do.

Q. Could you tell us what you recall of that telephone conference?

A. You know, the essence of Wade coming into this role was essentially -- I had heard that this was happening, but this was the formal introduction that Wade was going to be taking on a new role within the sales group, and that essentially his role was to be handling national and government accounts. Up to this point we had not had an individual in the national accounts group whose expertise or focus was PACS.

And as PACS became more of a mainstream product along with people buying CTs and MRIs and

angiography rooms, these hospitals also, within their GPO, those folks are saying two people like Premier and

[p.59]

Consortium GPOs. Hey, we're thinking about buying PACS this year. So people like Premier and Novation and what have you, would go to their membership and say, okay, if we can sign up a Siemens, let's say, and negotiate for you in advance what the discounts will be if you buy the Siemens product, is that something you would be interested in? And absolutely they all raise their hand and say, absolutely, we'd like for you to do that for us because it makes their lives easier.

The GPOs are incentive to do that because basically then they can gain 3 percent on whatever is spent on that product, you know, through them. So, essentially the goal in bringing Wade into that capacity was we found ourselves locked out of a lot of businesses. More and more hospitals would join in with GPOs, they become compliant. Basically meaning, if you're going to be a member of Novation, you have to say to Novation, okay, I'm going to buy a certain percentage of everything I buy in my facility is going to go through your organization.

So in order for them to be compliant, if Siemens wanted to sell PACS in any of these places that were members of these group purchasing organizations, you had to be on the contract. And so on more than one occasion it was brought to the attention of the folks in

[p.60]

our group if we don't have this license to hunt, so to speak, then the reality of it is, is regardless of what the radiology director wants or a radiologist of any of the clinicians within a facility, administration is going to tell them, I'm sorry, Siemens is not on that GPO contract. We're compliant with them. We have to buy whoever they've selected or given us an opportunity to buy from.

So when it was announced that Wade was taking on this role, we were all very excited about it, number one, because we were happy to have him back in the sales organization. Mr. Riesenberg had eliminated his position prior to that, which was where he was an OEM product manager dealing with computer radiography products and liaisoning to those external companies whose products we sold. Wade was now back into the sales organization and we were finally going to have an advocate on this GPO national accounts front that would be there to position our product and get us this hunting license so that for all intents if you're dealing with a Novation customer, you're not locked out of the deal before you even walk through the door.

Q. Okay. And what do you recall about this sales telephone conference that Doug Spotts told you about Wade coming on to assume this position?

[p.61]

A. Well, as sales people you can imagine that we're all very keen to have an understanding of how something like this might impact our own commission.

So, the question was asked by Christie Whelen, does -- if Wade is working on a project and dealing with a national account, does that somehow impact our own commission? Are we somehow going to have to give or will we be receiving less of a percentage on a deal because Wade would also be receiving a percentage on a deal.

And the response to that was, you know, no. Just as your account executives are comped on deals that you sell, so too are you. So that there's a dual commission role served in that particular purpose. If it's a Novation account that Wade has been working or a project that has been identified as a Novation customer, then Wade would get a piece of that, so would we, so would be the account executive.

Q. Prior to Wade being announced by Doug Spotts as the national accounts product sales executive, during any of the time that you were working in the IM division from '96 on, had there ever been a national accounts product sales executive in the IM division?

A. No.

Q. So what was your understanding of the territory that Wade was going to cover?

[p.62]

A. It encompassed, you know, the entire geography of the United States, as I know it.

Q. Was there any other product sales executive at that time when Wade came on as the PSE for national accounts who had a national territory?

A. No, not to my knowledge. Not selling PACS. Now, granted, there were other national accounts, people on the team and they had other expertise, but not in PACS, no.

Q. When you say other national accounts people, you're talking about Siemens globally, not the IM division?

A. Correct. Absolutely.

Q. Did you understand when Mr. Spotts answered that question the way you've just testified that he did, Christie Whelen's question about how it was going to affect their commissions and his commission was going to affect your commission, the regional product sales executives commissions, did you understand that that meant that Wade was not going to be splitting your commissions?

A. Correct. You know, again, the response that I would have expected had Doug wanted to indicate that would be, you know, you're paid 2.5 percent of a deal, okay? If it involves a project that Wade is engaged in

[p.63]

or then, you know, your commission is going to be cut down to a percent-and-a-half because we have to give him a percent. So I can only assume that if there was going to be some sort of a decrease in what we're going to get paid, that Doug would have responded in that manner.

Q. What did you understand -- you've already anticipated me a little bit in your earlier answer about

the national accounts product sales executive position announcement. But what did you understand Wade's responsibilities would be, anything other than or in addition to what you've already testified?

A. You know, government business was equally identified. You know, the reality of it is that we all found ourselves in a situation, especially in positions like what Wade had where he was a headquarters guy, where you're really at the whim of the director of the division to, really, he could put you really wherever he wanted when you worked in that capacity. And when he was the OEM product manager, essentially Tom Riesenberg was the fellow he reported to.

When he got transferred over into sales, he ultimately reported into Doug Spotts and then above Doug was a gentleman by the name of Gordon Rice, who had national sales manager responsibility for all product lines that Siemens sells. You know, so I don't know if I

* * *

[p.88]

very example that I talked about.

Q. And he treated you fairly, didn't he?

A. Doug was a fair boss.

Q. And you don't remember him ever lying to you about your compensation, do you?

A. No.

Q. Okay. And you thought he was honest?

A. I did.

MR. RUST: That's all I have.

THE COURT: Thank you. Any redirect, Mr. Bishop?

MR. BISHOP: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. BISHOP:

Q. You were asked some questions by Mr. Rust regarding commissions?

A. Yes, sir.

Q. Are you -- would you say that $130- to $140,000 income was average for a regional PSE when you were at Siemens?

A. Well, I mean, the reality of it is that that was the target income. You know, basically what they say your quota is, let's say, $6 or $8 million. If you sell $6 million in one year, let's say, the target income that we're going to pay you is $130,000.

[p.89]

The reality of it is that that was the minimum performance that was expected of you. That's how you were going to keep your job. But because there is no cap on our ability to earn income with the company, as

I said, you know there had been a string of years where, you know, I had not made less than $200,000 at Siemens and then my best year was $299,000.

Q. If a sale was made on product that was involving a hospital, as you described, or a hospital complex, as you described, that has its base where you are and has its -- and also has product being placed in California, would you get your commission on that product and the regional PSE in California get his commission on that product?

A. Yes. The original PSE in California would get whatever amount of that order was to be placed in their territory. In fact, there's a provision in the plan that talks about, you know, where it's being placed and what the provision is for the guy that sells it versus the guy who has to, you know, install it and support it after the fact. So, I mean, it's -- it's obviously an issue that's come up for Siemens on a couple of occasions, otherwise they would not have put a specific entry in here to cover that when that instance comes up.

MR. BISHOP: Thank you, Mr. Seiter.

* * *

[p.95]

rather than counsel table. We know you're not sworn. We know you're not the witness, but it may be a little more representative of the give and take.

MR. BISHOP: So, Your Honor, I'll read the questions and she'll answer them.

THE COURT: That would be my expectation as to how you would do it. And if you can be sure to let Defense Counsel know what page you're on. And if you make any jump transitions, let them know and let them catch up in the pagination, so they can be aware of things.

MR. BISHOP: We have tried to slender this, Your Honor, and so we will.

THE COURT: It's not always the absolutely most fascinating way compared to live witnesses, but sometimes it's absolutely the appropriate thing to do.

MR. BISHOP: Thank you, Your Honor.

(The deposition of CHRISTIE WHELEN was then read to the jury in open court.)

MR. RUST: I object.

THE COURT: I take it the objection for the grounds is the witness, Ms. Whelen, shouldn't be expressing an opinion as to Mr. Davis's performance?

MR. BISHOP: Is that a relevance objection?

THE COURT: It's a competency objection, I

* * *

[p.98]

MR. BISHOP: This is the deposition of Winn Corder.

THE COURT: Let's let Defense Counsel retrieve that. Everyone's dream is that some day we will be able to do all this without pieces of paper, and we're actually making a lot of progress in the legal system in reducing paper, but we still -- it's still a paper-related world in a lot of ways. You'll see paper exhibits, paper depositions, things like that. I think ten or fifteen years from now probably we'll mostly be looking at video monitors in the courtroom, and we're kind of in a transition zone on that. Mr. Bishop.

MR. BISHOP: All right.

(The deposition of WINN CORDER was then read to the jury in open court.)

THE COURT: Mr. Bishop, do you have a feel for how much more of this there is?

MR. BISHOP: There is a bit more, Your Honor. We can stop after the conclusion of this.

THE COURT: Why don't you find a convenient stopping place and the reason is people are starting to come in. We've got a criminal matter that was continued yesterday that we'll need to attend.

MR. BISHOP: We'll stop at the section. Just a few more lines.

* * *

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 3:04-CV-195-H

[Dated February 23, 2006]

JERRY DAVIS	)
PLAINTIFF,	)
	)
-VS-	)
	)
SIEMENS MEDICAL SOLUTIONS	)
DEFENDANT.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME IIA
BEFORE MAGISTRATE JAMES D. MOYER

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* * *

[p.12]

A. Yes.

Q. And did you have a proposal for Mr. Spotts as to how your commission would work?

A. Did I have a proposal?

Q. Yes.

A. No. Actually, in bringing it up we agreed on basically the lay of the job and how it would be

covered. And basically the national accounts was to be done as basically giving the sales guys the license to hunt and go out and sell to the GPO hospitals, themselves. We would basically be compensated differently for those accounts. And then the Government side, while the Government actually has two different segments in the U.S. and outside the U.S., the same would apply to Government hospitals here in the U.S. The local sales specialist would still be responsible for making that individual sale, and then outside of the country I became the primary sales person.

Q. Okay. And how were your commissions to be calculated? By what method were they to be calculated for the national accounts?

A. It was described to me by the normal sales executive comp plan. There was no caveats or anything given. It was, you will be a PSE, you'll have a comp plan, and you'll be paid accordingly.

[p.13]

Q. Did Mr. Spotts say anything to you about what dollars you would be paid on and what relationship your commissions would have to the other product, the regional product sales executives?

A. It would be paid on anything that was booked under national accounts. National accounts includes both Government and GPOs.

Q. Did you understand from this promise by Mr. Spotts that you would be receiving a dual or override commission?

A. It wasn't described as, quote, a dual, but basically what was said is that the sales specialist and local sales specialist would get their commission. I would have my own comp plan and I would be paid by it. And, so, in fact, it was a dual commission. One didn't have any determination with the other.

Q. What did you expect would happen and what did you understand from what Mr. Spotts promised you would happen with regard to sales in territories where regional products sales executives had been assigned with national accounts sales dollars?

A. Again, my role was to give them the opportunity to make that sale and to support them, if they needed support, while pushing that individual deal. And when that, if they were lucky enough to get that,

[p.14]

then I would be paid my commission based on that order being booked through national accounts.

Q. Did you understand that you would be splitting commissions in any way with any product sales executives or account executives?

A. No, that was -- I brought that up with Doug because the problem I didn't want to get into -- outside of being in sales, and you don't want to split your sales commission with somebody. I had worked with these guys, many of them several years, and we were more of a family than colleagues. And I would not accept the job, one, in competing with my friends and, two, it really wouldn't have been beneficial for me if the local sales guys felt I was going to come in and take half

their sales commission. The GPO sales wouldn't have grown, so it didn't make sense.

Q. And did Mr. Spotts agree with you with regard to this?

A. Yes.

Q. And did Mr. Spotts represent to you that these accounts would be -- these national accounts would be subject to a commission paid to you on every dollar?

A. Yes.

Q. What did you expect to do for Siemens in this new job?

* * *

[p.36]

end, when the year end is over and the books are basically finished for the year, headquarters gets a lump sum of money to the division that basically pay bonuses to its people in headquarters. And it was explained to me that my commission, he would pay me out of that bonus at that time of the year because there was no way to fix the problem in NASP, which is the computer system.

Q. Did you tell Mr. Riesenberg or confirm with Mr. Riesenberg what Mr. Spotts had told you about receiving commissions on all GPO sales or national account sales?

MR. RUST: Objection. It's hearsay what he told Mr. Riesenberg.

THE COURT: Overruled.

BY MR. BISHOP:

Q. You can answer the question.

A. Okay. I'm sorry, could you ask the question?

Q. I can. Did you inform Mr. Riesenberg about what Mr. Spotts had told you regarding your commissions on all sales booked to national accounts?

A. The conversation was basically, you know, I went to Tom and I said, I've got a problem with my national accounts. And basically just described that I can't get my name in the system to get paid because it's showing, you know, the local PSE. So, it wasn't a direct

[p.37]

relation to the conversation I had, but it was -- the fact was still that if my name went in, I was going to bump the local sales guy and that was not what we agreed to.

Q. Okay. And did Mr. Riesenberg indicate in anyway that he didn't understand that or he didn't agree with that?

A. No.

Q. I think that you may have said when you were trying to pin down when this trip happened and when you went to see the bookings office, I think you may have said January and then you said February, March

time frame. I know that because of your work schedule that it's hard for you to track dates sometimes, but do you recall about when this was?

A. It would have been after the first of the year. January would have been the earliest. It was probably February, March time frame would be my guess.

Q. Okay.

A. The reason that I know it would have been after the first of the year is because right after I accepted the job, there's a trade show that comes up at the end of November every year, the weekend after in Chicago for a week. You come back you basically got the holidays. So basically Siemens shuts down for a month

* * *

[p.56]

I just, I think that's -- I think that's an invitation to unfair prejudice. I think the question before the jury is quite a narrow one and that was whether there was a misrepresentation that meets those elements that occurred back at the time that the job was offered to them.

So I'm not going to allow the Riesenberg termination related matters in. That will be the Court's ruling. I know it's not -- it's not the position that the Plaintiff would advocate.

MR. BISHOP: It's devastating to our case, Your Honor. Devastating to our case.

THE COURT: All right. Well, I will listen to the evidence as it comes forward and I want to hear the full context of this. If it turns out that my reading of these deposition transcripts is undercut by testimony and Mr. Riesenberg appears to be a front-end actor as opposed to a back-end, unfair terminator, I will be keenly aware of that and I can reconsider this ruling, but that's where I am at this point.

Let me return the deposition excerpts to the parties and let's call the jury back in and let's continue with where we are.

MR. BISHOP: Your Honor, those exhibits were intended to show that Riesenberg was trying to get rid of Wade rather than pay his commission and is it -- we are

* * *

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY LOUISVILLE DIVISION

No. 3:04cv195

[Dated February 23, 2006]

JERRY W. DAVIS
Plaintiff,

vs

SIEMENS MEDICAL SOLUTIONS USA, INC.
Defendant.

TRANSCRIPT OF JURY TRIAL

VOLUME II - B

Heard before the Magistrate Judge James D. Moyer on February 23, 2006, at approximately 1:00 p.m.

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* * *

[p.54]

A. No.

Q. Okay. It is nice to have that guarantee, though, isn't it?

A. I'm -- it's a -- I was already guaranteed 85; 15,000 dollars, I wouldn't have taken it for 15,000.

Q. What about an extra 35,000?

A. I wouldn't have taken any sales job where they told me that this is all you have the limit to make.

A hundred and 35,000, while more than I was making, that is -- that's not what I was looking to do. I mean, I had been in this division for a long time. I

also was already doing a large degree of this job. I knew what several of sales guys were doing. And you know, I was wanting to get back in and make the money. There is no question about that.

Q. So, a 35,000 dollar raise wouldn't have been enough?

A. Not for that job, no. For the marketing job, maybe.

Q. How about a hundred thousand dollar raise?

A. That's -- I never thought in those terms. So, I -- I never really considered it.

Q. Is it your position that you wouldn't have taken the job unless Mr. Spotts promised you 1.77 million dollars?

A. That's -- Doug Spotts didn't promise me 1.7 million.

[p.55]

He promised me commission on all sales to national accounts.

Q. I know. But my question was: Had you known at the time what you're now asking this Jury to give you, is that what you would have insisted on, 1.77 million dollars?

A. No. I insisted on getting paid for the work that was done on accounts that were sold.

Q. So, you would have taken less than that?

A. Well, yeah.

Q. This job that you took on, this PSE role -- let me back up.

Did you develop some sort of skills or undergo some sort of transformation between 2001 and 2002 which makes you think that you should get paid 1.77 million dollars?

A. Again, I think I should get paid what the commission plan said I would get paid on. That was everything sold to national accounts. If we only sold 10,000 dollars that year, I wouldn't be expecting no where near that. That's not the case.

We're talking about, I am expecting to get paid what they told me they were going to pay me for.

Q. Is the answer to my question no, that you didn't develop some skills or undergo some transformation?

A. I already had skills to do the job.

Q. So, no big change in who Wade Davis was?

A. No.

* * *

APPENDIX L

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 3:04-CV-195-H

[Dated February 24, 2006]

JERRY DAVIS)
PLAINTIFF,)
)
-VS-)
)
SIEMENS MEDICAL SOLUTIONS)
DEFENDANT.)
)

FEBRUARY 24, 2006

TRANSCRIPT OF JURY TRIAL

VOLUME [I]II - A

BEFORE MAGISTRATE JUDGE JAMES D. MOYER

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* * *

[p.21]

it might work to pay somebody commissions in addition to base compensation in that job before you, right?

A. I'm not sure what the question is, I'm sorry.

Q. The company didn't have any experience to track what sort of commissions would result in how much compensation for somebody in your role prior to this?

A. They had the tools. They knew how much they booked in government accounts, so I would say, yes, they did.

Q. But nobody actually held this job before, nobody earned a living doing it before?

A. No. As far as I know it was the first time, which was the reason they created it because nobody had been doing it.

Q. Now, do you think Mr. Spotts said whatever he said to you incidentally without intention of lying, but simply because it wasn't clear on how to pay you in performing this new job?

A. Doug Spotts was a national sales manager. He knew what the numbers were. He gave me a job, gave me a compensation plan. What he thought, what he meant, all I can say it ended with a compensation plan that said I would get paid on national accounts.

Q. What I'm focusing on, do you think he was deliberately lying to you or do you think he was unclear

[p.22]

how the pay piece was going to work for somebody like you in this new job?

A. Whether he lied, whether he didn't understand how to configure it, I can't say for sure. I mean, shortly after he offered me the position, he left, so I didn't have the opportunity to go back later and discuss it with him.

Q. Okay. Now, if Mr. Spotts in this conversation in the restaurant had told you that you weren't going to get commissions on all sales to national accounts and government accounts, what would you have done? Would you have quit or would you have stayed in the job you already had?

A. I can't answer that. I mean, that's a theory.

Q. Well, you weren't thinking of leaving, though, were you?

A. Not at that time, no, but we had had discussions prior to that, before I accepted the job, about wanting to go back to sales. The PSEs had been asking for somebody, so it wasn't like a big surprise that morning.

Q. Right. But you're not thinking of leaving. Mr. Spotts sits down with you, talks to you about this job, and if he says to you right up front, you know, Wade, we are not going to pay you commissions on all

[p.23]

national accounts, we can't afford that. Isn't it true that what you would have done is just stayed put where you were in the existing job?

A. No, that's not true. If he would have told me that, I would have asked him why they couldn't afford it. And if it's because the way the commission plan is set, then I would assume that Siemens could have developed something differently. I wouldn't say that I would have quit. I wouldn't have said that I would have left or I would have stayed where I was.

Q. You would have tried to work out some other arrangement?

A. Yeah, if it was brought up.

Q. Maybe you would have been happy with $150,000?

A. No, I would never be happy being told what a cap would be and that's not why you go into sales.

Q. I understand you don't expect there to be a cap, but at the same time, you probably have in your mind some sort of expectation about what you might get?

A. I knew what other sales people were making, people that I had trained, people that had much smaller territory. So, yeah, I knew there was great potential there, yeah, there's no doubt about it. And, in fact, I had already been doing that job. I had been doing the presentation, I had been doing it. It was time to get

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[p.72]

Q. And so he was going to be the only product sales executive who was doing work in sales that didn't carry a commission for that work on GPOs? That's your testimony?

MR. RUST: Objection. Vague and ambiguous, Your Honor.

THE COURT: Answer the question as best you're able to understand it.

THE WITNESS: Okay. Thank you. If you could ask it again, Mr. Bishop. Sorry.

BY MR. BISHOP:

Q. Your testimony here today is that Wade Davis was going to be the only product sales executive, and I suppose GPO, it's your testimony here today that Wade Davis was going to be the only product sales executive who was assigned a particular sales responsibility who was not going to receive commissions for that responsibility. Was there any other product sales executive who was being assigned responsibilities who was not going to receive any commissions for those sales -- for that sales work?

A. Wade would receive commissions.

Q. He would receive commissions on the Government part is what you're testifying to now, but he wouldn't receive any commissions on the GPO part; is that correct?

[p.73]

A. Right.

Q. So that part of his job where he's working on these GPO accounts -- let me ask you this: You did say that you hired him to work on these GPO accounts, correct?

A. Yeah, that's correct.

Q. And his work on these GPO accounts was not going to be commission based; is that your testimony?

A. Understanding your question, yes, sir.

Q. If Wade Davis comes into, say, Kurt Seiter's territory, Kansas and Missouri, and as part of the GPO contracts he makes a sale in Kurt Seiter's territory, is Wade going to split a commission with Kurt Seiter?

A. First of all, Wade wouldn't make a sale to the GPO.

Q. I'm using make a sale to the GPO in a sense that I think it is used to refer to a sale to a GPO member?

A. Wade wouldn't go into Kurt's territory and make a sale to the GPO member. Kurt would make the sale to the member.

Q. And what if Wade did do that? What if he, in his GPO contracts, he finds out about a PACS that's going into a territory and he says, I worked this, I would like a commission on it. I think in your testimony you

[p.74]

indicated that you would be responsible for equitably splitting that?

A. In your question you asked if he would come in for a GPO member. He wouldn't come in for a GPO member as GPOs are memberships.

Q. Well, a hospital is a member of a group purchasing organization, is it not?

A. That is correct.

Q. So wouldn't it be appropriate or wouldn't you understand what I'm saying when I say a group member to refer to a hospital? You wouldn't understand that?

A. I would agree with that.

Q. Okay. So if Wade in his work with the GPO becomes aware that the GPO administrators know that there is a hospital member that is looking for a purchase of a PACS product, and Wade says, I would like to be able to receive a commission on this and I'm the one who became aware of the opportunity and so it's going to be placed here, you would equitably split that commission, would you not?

A. The answer to that is, no.

Q. Okay.

A. Because the GPO member is owned by the local rep.

Q. So in your testimony, did you -- were you

[p.75]

asked this question and did you answer in the following fashion. It's on page 63. "How would that have happened? Would he have gone to the sales executive that he maybe would have worked with and said, let's split the commission?" And you answered, "It would have been my responsibility to equitably split the deal between him and the local sales rep."

Do you recall being asked that answer and question and answering that way?

A. I recall the questions. However, preceding that --

Q. Let me get the answer on this. Did you answer that way?

A. I did. It's in testimony, sure.

Q. And you didn't say there that Mr. Davis would not be able to receive a split commission, you said he would get a split commission and I would equitably distribute it, did you not?

A. The question you asked me before was GPO members, if I remember the testimony of my deposition correctly. You had asked me, is there a scenario in these national accounts. Give me a hypothetical where Wade could own and drive and book an order, and that's how we led down the path of the discussion you're describing now.

[p.76]

Again, you got to remember national accounts, as we define them, parts of it is GPOs. Some of it is government accounts, as we talked about. There are other national accounts that are supported by our national accounts group that aren't GPOs. They're multistate health systems. And if -- I believe my testimony was describing an example in a multistate health system that's part of national accounts that Wade would be supporting, that would be a scenario where there potentially could be a split. So that's how

we got to the questions that you're referring to now in the deposition. But, again, you were asking me some hypotheticals.

Q. Is it your testimony now that you got Wade to take this position as the PSE for national and government accounts on a representation that he was only going to be paid commissions on government account sales?

A. The representation I made to Wade --

Q. Can I have a yes or no on that and then --

THE COURT: Answer it, yes or no, if you're able to.

THE WITNESS: Well, Your Honor, it's a tough question to answer.

THE COURT: You can answer it yes or no and then explain your answer.

* * *

APPENDIX M

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
AT LOUISVILLE**

No. 3:04cv195

[Dated February 24, 2006]

JERRY W. DAVIS)
Plaintiff,)
)
vs)
)
SIEMENS MEDICAL SOLUTIONS USA, INC.)
Defendant.)
)

TRANSCRIPT OF JURY TRIAL
VOLUME III - B

Heard Before the Magistrate Judge James D. Moyer on February 24, 2006, at approximately 1:42 p.m.

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* * *

[p.5]

THE COURT: Let me explain to the jurors what we're going do here. We're going move really quickly here for at least the next 40 minutes.

Mr. Bishop is going to conclude his examination quickly of Mr. Spotts and then we're going to allow the Siemens folks to take some witnesses -- the buzz word is out of sequence. They have got some business people who have been here for several days because they

weren't sure when they were going to be able to testify and they have plane reservations this afternoon, so we're going to let them take some testimony as part of their case next.

So, it will shuffle the order a little bit, but, again, we're trying to accommodate a number of people with schedule needs.

So, good to go. Mr. Spotts.

Mr. Spotts, you're still under oath, I'll remind you.

MR. BISHOP: If I may make one modification. We are reserving -- we are finishing this part of our examination of Mr. Spotts and reserving the rest of our examination for this when he's --

THE COURT: Well, if they put them on in their case, you can certainly cross examine him.

[p.6]

CROSS-EXAMINATION

BY MR. BISHOP:

Q. Mr. Spotts, I think you've testified -- I want you to confirm for me if this is correct -- that the GPO accounts were part of Wade's assignment as the new PSE for national and government accounts; is that true?

A. Yes. That's correct.

Q. Okay. What did you understand would be Wade's incentive for working on this important GPO part of his job?

A. His incentive?

Q. Yes.

A. His incentive would be to get more licenses to hunt, as we described.

Q. Wouldn't that be -- wouldn't that be his objective? Wouldn't that be what Siemens wanted him to do? Wouldn't that be objective?

A. Okay. Fair point.

Q. What would be his incentive? He was a salesman, correct?

A. Correct.

Q. And salesmen are incentivized by commissions at Siemens?

A. Correct. For the GPOs, his compensation was his base salary.

Q. And that's it. There is no commission incentive for

* * *

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
AT LOUISVILLE

No. 3:04cv195

[Dated February 27, 2006]

JERRY W. DAVIS)
Plaintiff,)
)
vs)
)
SIEMENS MEDICAL SOLUTIONS USA, INC.)
Defendant.)
)

TRANSCRIPT OF JURY TRIAL
VOLUME IV-[A]

Heard Before the Magistrate Judge James D. Moyer on February 27, 2006, at approximately 9:16 a.m.

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* * *

[p.35]

To the contrary, the only evidence is that Mr. Spotts testified that he wasn't authorized to make any such promise and, likewise, there is no evidence that Mr. Spotts previously made any representations regarding any employees commission eligibility. The evidence has consistently been that he did not.

Under these circumstances, as a matter of law, the plaintiff is not entitled to punitive damages.

THE COURT: All right. Thank you, Ms. Settle.

Mr. Bishop, I'm going to rule on this now. I don't mean to cut you off, but I think that -- that -- I thought a great deal about this over the weekend. And I'm convinced this is a case that has to be decided by the Jury.

I'm going to overrule the Rule 50 motion. I know it was thoughtfully prepared and well argued. But I think that, essentially, what Ms. Settle has argued is that it was, at worst, a misunderstanding, taking a lot of inferences in ways that are most favorable to the defendant and not favorable to the plaintiff. And I think it is ultimately up to the Jury to decide whether it was a misunderstanding or misrepresentation and if so, with what state of mind it was made.

You know, there are some tough judgment calls here, but the Court is reluctant to substitute its view of the facts for the view of the facts that the Jury -- they are the judge of the facts. And I acknowledge that there are some questions

* * *

[p.49]

A. Yeah. The -- that's a true statement. Yes.

Q. And I realize that technical distinction that you're making, but you're the national sales manager position was -- and maybe it is the preposition -- maybe we should say was "with" the IM division.

You were working with the IM division as national sales manager for the IM division.

A. For the IM division, yes.

Q. And that is the proper title, national sales manager, correct?

A. I think the proper title was national sales director.

Q. Did you ever get called national sales manager?

A. I'm sure I did. Yes.

Q. And in working for the IM division, were you aware of the group with which -- within which the IM division was placed in Siemens?

Did you have a -- you had an IM, division and then did you have a group that the IM division was part of? Was it something like the ISG, group imaging sales, or service group?

Are you aware of the group that that IM was in

A. A group? I mean, if -- I'm struggling with this one, Mr. Bishop. I'm sorry.

The organizational structure -- let me answer your question, I think I can get there, if you allow me to kind of

[p.50]

explain how it could be aware of what group they're in.

Q. Yes.

A. The divisions themselves within Siemens, whether it be IM, MR, CT, I know we use these acronyms before, those divisions report up to the senior management of CSG, customer solution group.

Q. Right.

A. The sales directors and sales resources report to the same senior managers within CSG. So, I guess I am familiar with the organization that they're a part of, or their reporting structure, but IM was a division, such as MR and CT, and they reported to the VP within Siemens, as well as the sales force.

Q. All right. Let me ask you: If you don't recognize a group in there that the IM division was part of, do you recognize a group called ultrasound? The ultrasound group?

A. Yes, sir, I do.

Q. Okay. That is completely separate from the IM division, correct?

A. Yes, they are.

Q. Okay.

A. They're like -- I'm sorry.

Q. They're like?

A. They're another modality. Ultrasound. MR.

MR. BISHOP: May I approach the witness, Your

[p.51]

Honor.

THE COURT: You may.

MR. BISHOP: This is Plaintiff's Exhibit 16.

BY MR. BISHOP:

Q. Just before we go to Plaintiff's Exhibit? -- And going back to the ultrasound group, salespeople in the IM division would not receive commissions on the sales of equipment in the ultrasound group, correct?

A. Not that I'm aware of.

Q. Okay. All right. Let's look at Exhibit 16.

The first page is a document that appears to be an electronically generated pay stub. And it is for Jerry W. Davis. And it is for the pay period beginning 9-30-2002 and ending 10-13-2002.

Do you see that at the top of the first page?

A. Yes, sir.

Q. And then you see that the pay rate is 3,269 and 23 cents biweekly?

A. Pay rate?

Q. In the same -- in the same -- it is directly below the box with the dates.

A. Yeah. Where it says "hours" and "earnings."

Is that where you are?

Q. I'm actually a little above that. Employee I.D., department, location?

[p.52]

A. Yes. I'm sorry. I got it. I'm sorry.

Q. Okay. It says pay rate is 3,269 and 23 cents biweekly?

A. Correct.

Q. Okay. And if I do the math, that's 85,000 dollars year.

Does that sound right to you?

A. I trust you.

Q. Okay. The job title is division marketing specialist three?

A. Okay.

Q. Okay? Do you see that?

A. I do.

Q. And that was your understanding that Wade Davis up until at least October 13, was still a division marketing specialist three, correct?

A. That's correct.

Q. He's making 85,000 a year?

A. Correct.

Q. So nothing surprising about that one.

Turn to the second page.

Now, you look at that same pay period, the beginning date is January 6th of 2002. The ending period is January 19, 2003, correct?

A. Correct.

[p.53]

Q. Okay. And at this time, Wade has been offered, accepted and assumed the position of PSE for national government accounts, correct?

A. That's correct.

Q. Okay. And if you look at pay rate, it is still 3,269 and 23 cents biweekly, correct?

A. That's correct.

Q. Do you have any explanation for why Mr. Davis is still being carried by Siemens as a division marketing specialist three being paid 3,269.23

biweekly after he's accepted this position as PSE of national and government accounts?

A. I do not.

Q. Okay. You were still national sales director or manager of the IM division at this time, correct?

A. That's correct.

Q. Okay. Now, if you'll turn to the third page, and this has -- this is the next pay period, including, actually, this has a starting date of January 20, 2003 and a pay ending date of February 2, 2003, correct?

A. Correct.

Q. Still for Jerry Wade Davis, as was the last one?

A. That's correct.

Q. And pay rate is still 3,269 and 23 cents biweekly, correct?

[p.54]

A. Correct.

Q. All right. But the title has now changed. It says, product sales executive, USG.

Can you explain to the Jury why Siemens didn't recognize Mr. Davis's product sales executive position until over two months after he had assumed that position, after -- at least two months after he had signed the paperwork on the position? Why is that?

A. I don't know.

Q. All right. Well, maybe you know this one: Why is the product sales executive followed by a dash and then followed by USG?

Do you know that?

A. No, I don't.

Q. We have established that USG stands for ultrasound group, correct?

A. I don't know if we I agree with that.

Q. You don't know?

A. I do know that US is ultrasound.

Q. Yes.

A. Not USG.

Q. Didn't we establish that there was an ultrasound group?

A. We did.

Q. Okay.

[p.55]

A. Yes, sir.

Q. And it is your testimony that you don't know if USG in Siemens refers to ultrasound group?

A. My answer to your question is, I think the ultrasound group is referenced to by USD. Ultrasound division.

Q. Well, I asked you specifically before about whether it was a group or a division. I asked you about IM being a division. It was. I asked you about ultrasound being a group, you said it was.

Now you say ultrasound is a division.

A. It is a division. Yes, sir. And when you asked me before, I also -- I think I said, ultrasound is much like CT, MR, a division within the organization.

Q. You said it was a modality, Mr. Spotts.

But in any case, look at the next document. And this is Exhibit 16 of the Defendant's. It is your Exhibit 16. You're going to like this Mr. Spotts. It's hard to see, but this is the only copy that we have from the defendant.

And I think you testified that IM salespeople would not receive commissions from the sale of ultrasound equipment, correct?

A. Yes, I did.

MR. BISHOP: Okay. And do you have a better copy of this, Dana.

[p.56]

That is a better copy than I have, although it is still -- it is still poor.

THE COURT: Help the Court out a bit.

MR. BISHOP: It is Defendant's 16.

THE COURT: Is it in evidence or not in evidence?

MR. RUST: We have not submitted it yet.

MR. BISHOP: It's --

THE COURT: Okay. I've got it in front of me.

BY MR. BISHOP:

Q. This is an SAP printout showing Sequoia equipment, correct.

A. Sequoia equipment.

Q. And Sequoia is ultrasound equipment, correct?

A. Correct.

Q. And this printout from Siemens SAP system appears to credit Wade with a 15,000 dollar equipment booking of ultrasound equipment, correct?

A. I'm not familiar with this document. This -- this is an SAP. I see it says SAP.

Q. Right.

A. This looks like an SAP printout of a configuration, I think.

Q. Isn't this the equipment sale that was earlier referred to that -- you've been sitting here throughout this trial -- that was earlier referred to as the 15,500 equipment

[p.57]

booking for Wade?

A. I don't know.

Q. And some sort of an 80 dollar commission?

A. I don't know.

Q. Well, if you look at this, in the ultrasound equipment that IM division salespeople don't get, and you look at that third page of Exhibit 16, Plaintiff's 16 -- it's a little confusing because you have Plaintiff's Exhibit 16 is the pay stubs, and Defendant's Exhibit 16 is the Sequoia equipment -- but plaintiff's exhibit, the third page shows Mr. Davis being assigned as the product sales executive to USG, and then he's getting a commission for something that he wouldn't get as a product sales executive in the IM division. In fact, no salesman would get any commission for it.

So, he's been assigned a sale and he doesn't get a commission for it, none of his commissions are, and isn't it a fact that what Siemens has done is, they have placed Mr. Davis in the ultrasound group instead of in the IM division where he's really working so he's completely cut off from commissions?

A. No, sir.

Q. How do you know that?

A. Well, he's a product sales executive.

Q. Right.

A. From this Exhibit 16.

APPENDIX O

PLAINTIFF'S EXHIBIT # 3

SIEMENS

November 11, 2002

Jerry Wade Davis
2503 Tom Joe Court
Louisville KY, 40242

Dear Jerry Wade,

On behalf of Siemens Medical Solutions USA, Inc., I am pleased to confirm your new assignment.

Your title will be Product Sales Executive, reporting to Doug Spotts. You will be paid a biweekly salary of $2,500. The company will also provide a car for your use in accordance with Siemens Company Car Policy. Your new assignment with Siemens Medical Solutions USA, Inc. will commence on 11/11/02.

You will be reimbursed for relocation expenses according to our Company Policy for current employees. To see that your move runs smoothly, we will provide you a relocation package through Relocation Gate Keepers, Inc. You will be receiving a call from them in the near future.

To indicate your understanding and acceptance of the above, please sign and return the attached

confirmation of acceptance by 11/11/02. We wish you the best of luck in your new position.

Sincerely,

/s/ Stacey Reina-Frankel s/T.D.
Stacey Reina-Frankel
National Sales Staffing

PLAINTIFF'S EXHIBIT

Case
No. 3:03Cv195

Exhibit
No. 3

0004

Siemens Medical Solutions USA, Inc.
186 Wood Avenue South **Tel: (732) 321-4500**
Iselin, NJ 08830 **Fax: (732) 494-2250**

SIEMENS

CONFIRMATION OF ACCEPTANCE

I acknowledge that I have read, understand and accept this offer Product Sales Executive as described by the attached offer letter dated November 11, 2002, and that this letter encompasses the entire promises, commitments, representation, statement of fact, intention or law set forth by Siemens Medical Solutions USA, Inc. concerning this offer of employment.

/s/	11/14/02
Jerry Wade Davis	Date

0003

APPENDIX P

PLAINTIFF'S EXHIBIT # 4

GUARANTEE RIDER

To Product Sales Executive
Compensation and Commission Plan

For: Jerry Wade Davis

I. PURPOSE

This Rider is made a part of the Product Sales Executive Compensation and Commission Plan, which is to be used as the basic instrument for policy and procedure. The Guarantee Rider is made available to assure a newly appointed Product Sales Executive a guaranteed minimum level of income for a limited defined period of time. It is expected that at the end of this period, commissions for new orders generated during the period of this period will replace the requirement for guaranteed income.

II. DURATION OF RIDER

The Guarantee Period begins **11/11/02** and ends on **11/10/03** unless terminated earlier in writing by the responsible National Sales Manager. Such written termination must be issued no less than 14 days prior to the end of a fiscal month.

III. GUARANTEE PAYMENT

The monthly guarantee payment will be **$2916.67**, in addition to the basic salary of the Product Sales Executive. The total of all Guarantee payments will total **$35,000.00.**

IV. METHOD OF COMMISSION APPLICATION TOWARD TOTAL GUARANTEE PAYMENT

All commissions which would be credited and/or payable during the defined period under the standard Product Sales Executive Compensation and Commission Plan will be applied toward the total guarantee payable.

PLAINTIFF'S
EXHIBIT

Case
No. 3:03Cv195

Exhibit
No. 4

0001

Siemens Medical Solutions USA, Inc.
186 Wood Avenue South **Tel: (732) 321-4500**
Iselin, NJ 08830 **Fax: (732) 494-2250**

V. SITUATION WHEREIN GUARANTEE PAYMENTS EXCEED APPLIED COMMISSIONS

The Product Sales Executive shall retain all excess guarantee commission payments received during the defined period or, if applicable, until the date of transfer or termination.

VI. SITUATION WHEREIN GUARANTEE PAYMENTS ARE LOWER THAN APPLIED COMMISSIONS

In the event that the total credited and/or payable commissions applied exceed the total guaranteed commissions payable during the defined period of the Guarantee Rider, the Product Sales Executive shall be entitled to full payment of such excess in accordance with the "when paid" provisions of the standard Compensation and Commission Plan.

Above terms received, read
and accepted this day of: 11/14/02 s/s _____
Signature

Confirmed by: Siemens Medical Solutions USA, Inc.

_____ _____
District Manager Date

_____ _____
VP, Field Operations Date

_____ _____
Director, Human Resources Date

cc: Human Resources
Accounting
Payroll

0002

APPENDIX Q

UNITED STATES COURT OF APPEALS
6TH CIRCUIT

CASE NO. 07-5420

[Dated June 10, 2008]

JERRY W. DAVIS	)
APPELLANT	)
	)
V.	)
	)
SIEMENS MEDICAL	)
SOLUTIONS USA, INC.	)
APPELLEE	)
	)

AFFIDAVIT OF ROBERT W. "JOE" BISHOP, ESQ.

ROBERT W. "JOE" BISHOP, being first duly sworn, states as follows:

1. I make the following statements based on my personal and first-hand knowledge and experience;

2. Contrary to the statement in the per curiam opinion of the panel in this case that "[t]o the extent that Davis's statutory claim is based upon the failure of the defendant to pay the entire *base salary* promised in the company's guarantee rider,

we are informed by counsel that the issue has been resolved out of court to the satisfaction of both parties" (Davis v. Siemens Med. Solutions USA, Inc., 2008 U.S. App. LEXIS 11934, *5-6 (6th Cir. 2008)), counsel for the Plaintiff have **not** informed the panel that the issue has been resolved to the satisfaction of the Plaintiff, Mr. Davis. Except for oral argument in the above captioned case, Mr. Davis's counsel have never spoken with any member of the panel in this matter about this case or any alleged settlement of the same;

3. When, after oral argument in this matter, I was contacted by Mr. Robert Rack, Chief Mediator of the Sixth Circuit, and informed that the Panel had requested that he try to settle this case, I duly conferred with Appellant, Mr. Wade Davis, about such settlement, and conveyed to Mr. Rack another good faith offer by Mr. Davis to settle. This was met by another nuisance offer from Siemens, and, accordingly, once again, no settlement was reached between the parties;

4. When Mr. Rack later called me to confirm that we finally had received checks for (1) the $15,000 unpaid Guarantee Rider (less withholding of almost $6,000) Siemens had admitted in its brief and in its oral argument it owed Mr. Davis, but, contrary to its false express and implicit assertions that it pays its just debts, Siemens had never paid him, and (2) an arbitrary four percent interest on that sum for only part of the years it had not been paid him (inexplicably not beginning until January of 2005, instead of when it actually first was owed in 2002 and 2003), I was very careful to inform Mr. Rack (in a return voice mail message) that, while I

had confirmed that such checks finally had been received at my firm that day, they did not cover the attorneys fees, liquidated damages, or statutory interest permitted by Kentucky's wage statute as to even the theretofore unpaid $15,000 Guarantee Rider amount, and certainly did not satisfy any of Mr. Davis's claims;

5. In fact, even the cover letter from Siemens' counsel recognizes, and specifically states that "[t]hese payments are being made unilaterally and unconditionally. Siemens is not requesting that Mr. Davis waive any claims that he may have against the Company in exchange for this payment." Letter from Dana Rust attached as Exhibit A.

6. When I saw the above quoted language in the Panel's per curiam opinion, I immediately called Mr. Rack again, and, when he called me back, confirmed with him that he had not informed the panel that "the issue has been resolved out of court to the satisfaction of both parties." (Davis v. Siemens Med. Solutions USA, Inc., 2008 U.S. App. LEXIS 11934, *5-6 (6th Cir. 2008).

FURTHER AFFIANT SAYETH NAUGHT.

/s/
Robert W. "Joe" Bishop

SWORN TO BEFORE ME in my presence this 10th day of June, 2008, by Robert W. "Joe" Bishop.

[Seal of Notary]

/s/ Cynthia G. Bishop
NOTARY PUBLIC

Commission expires: 7-10-08

Exhibit A

McGuire Woods LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030
Phone: 804.775.1000
Fax: 804.775.1061
www.mcguirewoods.com

McGUIRE WOODS
Dana L. Rust
Direct: 804.775.1082
drust@mcguirewoods.com
Direct Fax: 804.698.2158

May 21, 2008

VIA FEDERAL EXPRESS

Robert W. Bishop, Esquire
Bishop & Associates, P.S.C.
6520 Glenridge Park Place, #6
Louisville, Kentucky 40222

Jerry W. Davis v. Siemens Medical Solutions USA, Inc.
Case No. 07-5420

Dear Joe:

Enclosed please find two checks. The first check is made out to Mr. Davis for $15,000.00 less withholdings required by law. Siemens made withholdings on this check because the payment represents back pay for the amount that Mr. Davis did not receive during his

employment with Siemens but which was covered by his guarantee rider. The second check is also made out to Mr. Davis and is interest on the first amount. We used a 4% interest rate beginning January 1, 2005 and continuing to the present. The current T-Bill rate is only 1.93% and, while we could have used this rate pursuant to 28 U.S.C. § 1961, we think the 4% rate is a better estimate of what Mr. Davis could have earned on this sum during the relevant time period.

These payments are being made unilaterally and unconditionally. Siemens is not requesting that Mr. Davis waive any claims that he may have against the Company in exchange for this payment.

Please contact me if you have any questions,

Sincerely yours,

/s/
Dana L. Rust

cc: Robert Rack (via Federal Express)
Robert F. Holland, Esq.

114

No. 08-715

Supreme Court, U.S.
FILED
JAN 6 - 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JERRY W. DAVIS,

Petitioner,

v.

SIEMENS MEDICAL SOLUTIONS USA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

STEPHANIE P. KARN
Counsel of Record
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Richmond, VA 23219
(804) 775-1000

Counsel for Respondent

January 2, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATEMENT OF THE CASE

Petitioner, Jerry Davis, alleged that he was entitled to approximately $1.8 million in sales commissions from his former employer, Siemens Medical Solutions. This was 18 times more than petitioner had earned in previous years at Siemens, more than Siemens paid any of its other 11,000 employees, including its CEO, and more than Siemens paid to all 17 of its other similarly-situated commissioned sales persons combined.

Petitioner advanced a variety of state law claims, including breach of contract, fraudulent misrepresentation, promissory estoppel, conversion, a wage claim under a Kentucky statute and a claim for breach of fiduciary duties. The most important piece of evidence in the case was petitioner's written commission plan, which required that he be "personally and directly" responsible for a sale to earn a commission on it. The trial court granted Siemens' summary judgment on all but one of petitioner's claims, primarily because it was undisputed he was not personally and directly responsible for the sales on which his commission claim was based.

The case went to trial on petitioner's fraudulent misrepresentation claim which was based on an oral promise allegedly made by petitioner's supervisor ***before*** petitioner executed his written commission plan. A jury returned a $200,000 verdict for petitioner. The trial court set aside the verdict and entered judgment for Siemens on the ground that the

petitioner could not have reasonably relied on an alleged misrepresentation that was contradicted by the terms of his subsequent written commission plan. The Sixth Circuit affirmed on this basis in an unpublished *per curiam* opinion. The Sixth Circuit also rejected the statutory wage claim, concluding if it was a claim for commissions, it was defective because no commissions were owed and if it was a claim for base pay, it had been resolved while the case was on appeal.

REASONS FOR DENYING CERTIORARI

This is a routine claim for sales commissions brought by an individual against his former employer under Kentucky state law. Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for *compelling reasons.*" Sup. Ct. R. 10 (emphasis added). The Court should deny the petition because no such "compelling reasons" are present here. Rather, petitioner's arguments, distilled to their essence, are that the trial and appellate courts misapplied Kentucky law and made erroneous factual findings. These are not appropriate grounds for granting a writ of certiorari.

1. Petitioner challenges only the Sixth Circuit's and District Court's application of state law and factual findings.

The petition asserts that the lower courts *misapplied* Kentucky law on his statutory wage claim and on his fraudulent misrepresentation claim. For his wage claim, petitioner acknowledges that the trial court properly stated the terms of the applicable Kentucky statute and subsequently amended its ruling following the ruling in the *Parts Depot* case, but he argues that "the district court mistakenly concluded that the unrelated terms of the Commission Plan did not entitle Mr. Davis to the claimed commissions, bonuses, and guaranteed income." (Petition at p. 8-9). He further argues that the Sixth Circuit "erroneously misstated in its opinion that 'to the extent that Davis' statutory claim is based upon the failure of the defendant to pay the entire base salary promised in the company's guarantee rider, we are informed by counsel that the issue has been resolved out of court to the satisfaction of both parties.'"[1] (*Id.* at p. 10). The first argument asserts that

---

[1] Petitioner incorrectly states that Respondent conceded in briefing and at oral argument that Mr. Davis was owed the full guarantee rider. (Petition at p. 10). Respondent has never made such a concession but has instead consistently argued that Mr. Davis waived any claim under the rider when he testified unequivocally in his deposition that he was not owed any money for the guarantee rider. Nevertheless, without conceding its position, Respondent unilaterally paid Mr. Davis the $15,000 he claims he was owed and interest.

the trial court misapplied Kentucky law. The second argument is based on an alleged erroneous factual finding. "A petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Petitioner's argument that it was erroneous to set aside the jury verdict and enter judgment for Siemens on the fraudulent misrepresentation claim suffers from the same flaws. It is based on the premise that the lower courts misapplied Kentucky common law on fraud and overlooked certain facts. The petition rehashes the facts in the case for seventeen pages, thereby conclusively demonstrating that the primary "asserted error consists of erroneous factual findings." Sup. Ct. R. 10.

2. Petitioner has not presented an issue of national significance.

Petitioner attempts to frame his case as one presenting "important principles of federalism" but it is nothing more than an argument that the lower courts failed to follow Kentucky law. On that point, both the trial court and court of appeals faithfully applied Kentucky law when they arrived at the conclusion it was not reasonable for petitioner to rely on alleged misrepresentation that was flatly contradicted by his subsequent written commission plan and when they rejected his statutory wage claim. However, even if the lower courts misapplied Kentucky law, this

clearly does not present a compelling issue of national significance sufficient to grant the writ of certiorari. "[T]his Court's function, generally speaking, is not to correct federal courts' misapplications of state law, except, perhaps in exceptional cases. . . . I do not believe that this Court has a stake in the correctness of discrete state-law decisions by federal courts." *Thomas v. American Home Products, Inc.*, 519 U.S. 913, 916-17 (1996) (Rehnquist, C.J. dissenting); *see also Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) ("To be sure, we do not normally grant petitions for certiorari solely to review what purports to be an application of state law. . . .").

3. Petitioner's federalism argument was not raised in or addressed by the lower courts.

Petitioner never raised any Constitutional claims rooted in principles of federalism at any time in this case. Absent a compelling reason (which petitioner does not even attempt to offer), the Supreme Court will not consider issues included in a petition that have not been addressed in the lower courts. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992). Thus, the petition for writ of certiorari should also be denied because petitioner failed to raise below the issue he seeks to present this Court.

CONCLUSION

Petitioner's lawsuit is a garden-variety state law claim for sales commissions. Petitioner has a very heavy burden to justify granting certiorari; one he clearly has not shouldered. He did not plead a violation of any federal laws in his complaint and his petition does not raise any Constitutional issues or implicate principles of federalism in any meaningful way. This Court has repeatedly "emphasize(d), . . . that, standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). There is no reason to treat this petition any differently. Accordingly, the Court should deny the petition for writ of certiorari.

Respectfully Submitted,

SIEMENS MEDICAL SOLUTIONS USA, INC.

STEPHANIE P. KARN
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Supreme Court, U.S.
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117 (3)

No. 08-715

In The
Supreme Court of the United States

JERRY W. DAVIS,
Petitioner,

v.

SIEMENS MEDICAL SOLUTIONS USA, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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January 15, 2009

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE DEFENDANT'S REASONS FOR DENYING CERTIORARI ARE UNSOUND

The lower courts' refusals in this case to apply the controlling laws of Kentucky are egregious violations of the our Country's constitutional system of Federalism. "This separation of the two spheres is one of the Constitution's structural protections of liberty. 'Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'" Printz v. United States, 521 U.S. 898, 921 (1997) (quoting, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)). See also, United States v. Morrison, 529 U.S. 598, 655 (2000) (J. Breyer, dissenting in part) ("[n]o one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty -- both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home.").

Among other things, the District Court and the Court of Appeals denied Mr. Davis the chance to have his Kentucky state wage and hour claim heard by a jury, as required by Kentucky Revised Statute

§ 337.385.[1] This denial was a violation of the United States Constitution's principle of Federalism as described by James Madison, and quoted by Justice Thomas:

> The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

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[1] When the Petitioner appealed the District Court's incorrect holding to the Sixth Circuit Court of Appeals, the Respondent conceded in its briefing before the Sixth Circuit, and during the appellate oral argument, that the Petitioner was owed his full $35,000 guarantee rider, a substantial part of which Siemens still had not paid him. The Sixth Circuit panel then erroneously misstated in its opinion that, "[t]o the extent that Davis's statutory claim is based upon the failure of the defendant to pay the entire base salary promised in the company's guarantee rider, we are informed by counsel that the issue has been resolved out of court to the satisfaction of both parties." Davis v. Siemens Med. Solutions USA, Inc., 2008 U.S. App. LEXIS 11934, *5-6 (6th Cir. 2008). **To the contrary, counsel for the Petitioner never informed the panel of any resolution or satisfaction of any claim.** The Respondent never refuted this in its Opposition, or anywhere else. In fact, counsel for Respondent has admitted in correspondence of record that "[t]hese payments [were] being made unilaterally and unconditionally. Siemens [was] not requesting that Mr. Davis waive any claims that he may have against the Company in exchange for this payment." (App. 146a-147a).

Gonzales v. Raich, 545 U.S. 1, 57 (U.S. 2005) (J. Thomas, dissenting) (quoting, The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961)). When the lower courts granted Respondent's renewed judgment as a matter of law they also violated this fundamental principle, by failing to follow the law of Kentucky as stated by the Kentucky Supreme Court in Hanson v. American Nat'l Bank & Trust Co., 865 S.W.2d 302 (Ky. 1993). Hanson unequivocally held that no contract language is strong enough to protect a party from its own fraud. Cf. UPS v. Rickert, 996 S.W.2d 464, 471 (Ky. 1999).

The principle of Federalism embodied in the United States Constitution presents an issue of such compelling national concern and has been violated in such a manner by Federal Courts in the case at bar that, it is respectfully submitted, this Court should grant this Petition for Writ of Certiorari in order to enforce and reaffirm the important principle that binds the federal courts.

I. THE LOWER COURTS HAVE BOTH MISAPPLIED AND MISSTATED KENTUCKY LAW

The lower courts have *misstated* an important point of Kentucky law, and have not merely "misapplied" that point, as the Respondent contends. In its opinion below, the Sixth Circuit affirmed the district court's finding that even if Doug Spotts, the Siemens National Sales Manager, had made representations "concerning the payment of commissions . . . Davis could not have reasonably relied upon that promise, given the clear contract language to the contrary." Davis v. Siemens Med. Solutions USA, Inc., 2008 U.S. App. LEXIS

11934, *3-4 (6th Cir. 2008). The Sixth Circuit's affirmation of the District Court's statement that the contract language regarding Mr. Davis's commission prevented him, in effect, as a matter of law, from relying on the Siemens National Sales Manager's promises regarding those commissions, is a direct misstatement, not a mere misapplication, of the current law in Kentucky.

The Kentucky Supreme court in Hanson v. American Nat'l Bank & Trust Co., 865 S.W.2d 302 (Ky. 1993) held:

> The idea that any person or industry or enterprise would be immune from liability for fraud and deceit is not acceptable. . . The law should not, and does not permit a covenant of immunity to be drawn that will protect a person against his own fraud. Such is not enforceable because of public policy. Language is not strong enough to write such a contract. Fraud destroys all consent. It is the purpose of the law to shield only those whose armor embraces good faith.

Hanson, 865 S.W.2d at 309-310; Cf., UPS v. Rickert, 996 S.W.2d 464, 471 (Ky. 1999). This statement from the Kentucky Supreme Court is a correct statement of the law of fraud in Kentucky, which the lower courts failed to even acknowledge, let alone correctly apply.

The lower federal courts' failure to acknowledge or correctly apply controlling state law is an issue of national and Constitutional concern and is of sufficient significance to warrant a grant of a writ of certiorari.

II. MR. DAVIS'S FEDERALISM ARGUMENT WAS SUFFICIENTLY PRESERVED IN THE LOWER COURT.

The Respondent has erroneously claimed that the Petitioner failed to ever raise "any constitutional claims rooted in the principles of federalism at any time in this case." However, the Petitioner's challenge of the lower court's erroneous rulings on the Petitioner's state claims, and the lower federal courts' ignoring of controlling state law, necessarily raises the principle of Federalism which is being invoked.

When a federal court is sitting in diversity, Constitutional principles of Federalism dictate that the court respect the laws of the state courts and legislatures. In the case at bar the District Court and the Sixth Circuit Court of Appeals each failed to respect and properly apply the law of Kentucky, and, accordingly, the Petitioner has resisted those erroneous rulings through this petition process. The very core of the lower courts' erroneous rulings have violated the principle of Federalism and the Petitioner has properly brought those issues before this Court.

In United States v. Mendenhall, 446 U.S. 544 (U.S. 1980) this Court took up an issue not expressly raised below because an "assumption, embraced by the trial court and the Court of Appeals, rest[ed] on a serious misapprehension of federal constitutional law." United States v. Mendenhall, 446 U.S. 544, 552, n. 5 (U.S. 1980); see also, Youakim v. Miller, 425 U.S. 231, 234 (U.S. 1976). The same is true of the decisions in this case, that is, the district court and the Court of Appeals embraced an assumption which rested on a serious misapprehension of federal constitutional

law – that they need not follow controlling state law in a diversity case established by the highest court in the state, the Kentucky Supreme Court. Hanson v. American Nat'l Bank & Trust Co., 865 S.W.2d 302 (Ky. 1993); Cf., UPS v. Rickert, 996 S.W.2d 464, 471 (Ky. 1999).

CONCLUSION

For all of the above reasons, the Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari and affirm the Constitutional principle of Federalism, which demands that the Federal courts respect and follow the laws of the states in a diversity case.

Respectfully Submitted,

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